CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1927

No. [redacted] 154

JOHN W. BLODGETT

vs.

CHARLES HOLDEN, COLLECTOR OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED DECEMBER 24, 1927

(32,246)

(32,346)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 779

JOHN W. BLODGETT

vs.

CHARLES HOLDEN, COLLECTOR OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Original	Print
Certificate from United States circuit court of appeals, sixth circuit	1	1
Statement of facts	1	1
Question certified	2	2
Judges' signatures	3	3
Clerk's certificate (omitted in printing)	4	

Gibbs & Donovan (Inc.), Printers, Washington, D. C., December 30, 1926

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

No. 4631

JOHN W. BISSELL, Plaintiff in Error,

vs.

CHARLES HOEGE, Collector of Internal Revenue, Defendant in Error

Error to the District Court for the Western District of Michigan

Before: Denison and Moorman, Circuit Judges, and Westenhaver, District Judge.

STATEMENT OF FACTS

PER CURIAM:

This action is one to recover back taxes paid upon transfers by gift, levied and exacted under Sections 319 to 324 of the Revenue Act of 1924, approved June 2d, 1924 (43 Stat. 253, 313).

Upon a motion in the nature of a general demurrer to the plaintiff's amended declaration, the District Court held that no cause of action was stated and rendered judgment for defendant. The facts are undisputed.

Plaintiff, during the calendar year 1924, was a resident of the United States. During that calendar year he transferred by gift property amounting in value to $872,025.66. Exclusive of gifts for charitable, public and other similar purposes which are exempt, the total amount of such gifts was $861,186.02. Of the total not exempt as gifts to charities, etc., $843,086.00 represented gifts made prior to June 2d, 1924, the date the Revenue Act of 1924 became effective, and $6,900.02 only represented transfers by gifts made after that date. Of the total gifts made before the law [fol. 2] was enacted and became effective $818,086.02 consisted of bonds issued by states or political subdivisions thereof. A specific exemption of $50,000.00 is allowed by the

Revenue Act. The net amount of the plaintiff's transfers by gift during the calendar year 1924, subject to tax, was therefore the sum of $800,196.92. On March 14, 1925, plaintiff, under protest that there was no valid law authorizing the exaction of the tax, paid to the defendant the sum of $52,023.52, the amount of tax provided by the Revenue Act. On the same day he made claim for refund, which was denied. These transfers by gift were all inter vivos, and no contention was or is made on behalf of the United States that they were gifts or transfers made in contemplation of death.

The district judge was of opinion that the tax levied by said sections of the Revenue Act of 1924 was properly levied and collected and that said Revenue Act was in no respect invalid. Upon like facts a contrary holding has been made by the United States District Court for the Southern District of New York. See 10 Fr. (2nd) 813. We are of the opinion that the provisions of Sections 319 to 324 of said Revenue Act were intended to subject these gifts to the tax so levied and paid, and that plaintiff is not entitled to recover back any part of the taxes so paid, if said provisions are not in excess or violation of the powers conferred upon Congress by the Constitution. We therefore desire, for the proper decision of this case, the instructions of the Supreme Court upon the following propositions of law.

QUESTIONS CERTIFIED

(1) Are the said provisions of Sections 319 to 324 of the Revenue Act of 1924 unconstitutional as applied to transfers of property by gift, under the circumstances above stated, because the tax so imposed is a direct tax and has not been apportioned, as is required by Clause 3, Section 2, and Clause 4, Section 9 of Article I of the Constitution?

(2) Are said provisions unconstitutional insofar as they impose and levy a tax upon transfers of property by gifts inter vivos, not made in contemplation of death, and made prior to the enactment of said Revenue Act of 1924, either because the same is a direct tax and unapportioned, or because it is a taking of the property of the donor or donee without due process of law, or for public use with-

out just compensation, in violation of the Fifth Amendment to the Constitution?

(3) Are said provisions of said Revenue Act unconstitutional and void as applied to transfers of property [fol. 3] by gift, under the circumstances above stated, insofar as it imposes said tax upon transfers of property consisting of bonds and other securities issued by a state or some political subdivision thereof for public uses?

Dated December 10, 1926.

A. C. Denison, Circuit Judge. Chas H. Moorman, Circuit Judge. D. C. Westenhaver, District Judge.

Clerk's certificate to foregoing omitted in printing.

Endorsed on cover: Filed No. 32,346. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 779. John W. Blodgett vs. Charles Holden, collector of internal revenue. (Certificate.) Filed December 20th, 1926. File No. 32,346.

INDEX

			Page
1.	Statement of Cause of Action	I.	1
2.	Citation of decision of District Court	I.	1
3.	Jurisdiction of this Court	II.	2
4.	Statement of Facts	III.	2- 3
5.	Argument	IV.	3-57
First.	*The Congress had no jurisdiction to tax a gift of State Securities*	IV	3-27
1.	Tax was on gift of State Securities	A	4
2.	If so, tax void, whether "direct" or "indirect"	B	4
3.	Taxing power must have jurisdiction	C	4- 6
4.	U. S. cannot tax State Securities	D	6- 9
5.	Nor States U. S. Securities	E	9-10
6.	Principle *obsta principiis* applied in such cases	F, G	10-12
7.	To be valid, taxing power must have jurisdiction of subject transferred and of transfer	H	12-13
8.	Tax does interfere with State functions	I, J K, L	13-26
9.	Tax cannot be sustained as a "death" tax	M, N	22-26
Second.	*Tax is direct and unapportioned*	A, B	27
1.	Calling tax a transfer tax does not make it so	C	27-31
2.	Meaning of "direct" tax	D-F	31-35
3.	Gift tax is within economic and legal definitions of a "direct" tax	G-J	35-44
4.	Is not within definitions of "indirect" tax	K	44-46

		Page
5.	Tax is on "property" by reason of its ownership	L 46-49
Third.	*Tax violates Fifth Amendment*	A 49-56
1.	Being retroactive has no voluntary feature. Congress has no jurisdiction	A-D 49-53
2.	Being unreasonable in its classification, Congress had not jurisdiction	E 53-55
Fourth.	Decisions in:	
	McNeir vs. Anderson, Anderson vs. McNeir	56-57
	LeFeber vs. Wilkinson Nunnemacher vs. Wilkinson	63-64
Fifth.	Conclusion	57
	Gift tax act	58-62

CASES CITED

	Page
Allgeyer vs. Louisiana, 165 U. S. 578....	48
Appendix A, Gift Tax Act.....	58-62
Appendix B, LeFeber vs. Wilkinson, Nunnemacher vs. Wilkinson.....	63-64
Bank vs. Doughton, Avd. Op. Dec. 15, 1926, 250	4, 6, 12
Bank vs. New York, 121 U. S. 138.....	67
Bank vs. New York, 2 Black. 620.....	9
Bank Tax Case, 2 Wall. 200.....	9
Bank vs. Mayor, 7 Wall. 16.....	9
Bank vs. Supervisors, 7 Wall. 26.....	9
Bank vs. California, 262 U. S. 366.....	10, 11
Barclay vs. Edwards, 267 U. S. 442.....	50
Beaulieu, Finance	36
Billings vs. United States, 232 U. S. 261..	34, 52
Blodgett vs. Holden, 11 F. R. (2nd) 180	1, 13
Brown vs. Maryland, 12 Wheat. 419....	19, 27, 54, 57
Brushaber vs. Union Pacific, 240 U. S. 1	51
Buchanan vs. Warley, 245 U. S. 60.....	23, 24, 47
Burke vs. Wells, 208 U. S. 21, 22.....	19, 20
Chicago vs. Collins, 175 Ill. 445.....	23, 26
Child Labor Cases, 259 U. S. 20.....	51
Chicago vs. Englewood, 115 Ill. 375.....	43
Choctaw vs. Harrison, 235 U. S. 292.....	10, 11
Collector vs. Day, 11 Wall. 113.....	6, 8
Cook vs. Pennsylvania, 97 U. S. 566.....	19, 20
1 Cooley on Taxation, 4th Edition.....	4
9 Corpus Juris, Sec. 1281.....	40
12 Corpus Juris. Sec. 945.....	23
Cuzner vs. Cal. Club, 155 Cal. 303.....	46
Dawson vs. Ky. Distilleries, 255 U. S. 288	19, 20, 26, 28, 30

	Page
Dixon vs. People, 168 Ill. 179	43
Dixon vs. People, 39 L. R. A. 116	43
Dobbins vs. Erie Co., 16 Pet. 435	6, 8
Easton vs. Boston, 51 N. H. 504	43
Eisner vs. McComber, 252 U. S. 189	33, 42
Evans vs. Gore, 253 U. S. 255	6, 9, 26
Fairbanks vs. United States, 181 U. S. 297	19, 20
Fargo vs. Michigan, 121 U. S. 230	27, 29
Farmers & Mech. Bank vs. Minnesota, 232 U. S. 516	10, 11, 14
Federal Land Bank vs. Crosland, 261 U. S. 374	10
Flint vs. Stone Tracy Co., 220 U. S. 107	28, 30, 34, 38 40, 46, 51
Frick vs. Penn., 268 U. S. 473	4, 5, 12
G. C. & S. F. Ry. vs. Ellis, 165 U. S. 150	55
Gardner vs. Hall, 61 N. C. 21	40
Gillespie vs. Oklahoma, 257 U. S. 501	10, 11
Goddard vs. Chafee, 2 Allen 395	46
Grand Rapids Boom Co. vs. Jarvis 30 Mich. 320	48
Grether vs. Wright, 23 C. C. A. 496	6, 9, 10
Hammer vs. Dagenhart, 247 U. S. 251	51
Head Money Cases, 18 F. R. 135	40
Hecht vs. Malley, 265 U. S. 144	52
Hill vs. Wallace, 259 U. S. 44	51
Holden vs. Hardy, 169 U. S. 366	24
Home Savings Bank vs. Des Moines 205 U. S. 503	4, 5, 22
Hylton vs. United States, 3 Dall. 171	34, 40, 46, 47
Insurance Co. vs. Soule, 7 Wall. 433	34
Jaybird vs. Weir, Adv. Op. July 1, 1926, 675	10, 12
Johnson vs. Maryland, 254 U. S. 51	10, 11

	Page
Kansas City vs. Botkin, 240 U. S. 227...	28, 30
Knowlton vs. Moore, 178 U. S. 47.....	22, 32, 34
Kuhn vs. Detroit, 70 Mich. 534.....	48
Law, Ex parte, 15 F. C. 8126.....	43
Leedy vs. Bourbon, 12 Ind. 486.....	40
LeFeber vs. Wilkinson, Appendix B....	56
Loan Assn. vs. Topeka, 20 Wall. 663....	26
McCullough, Taxation	36
McCullough vs. Maryland, 4 Wheat. 316	6, 9
McNeir vs. Anderson, 10 F. R. (2nd) 813	56
McCray vs. United States, 195 U. S. 27	34, 50
Magoun vs. Bank, 170 U. S. 288.....	23, 55
Mercantile Co. vs. New York, 121 U. S. 138	8
Metcalf vs. Mitchell, Adv. Op. 2 16 26, 185	10
Miller vs Milwaukee, Adv. Op. Jan. 3, 1927, 346.....	10, 12
Montgomery vs. Kelly, 142 Ala. 552.....	23, 26
Murchison vs. McNeill, 60 N. C. 217.....	40
Nat'l Bank vs. United States, 101 U. S. 1	34
Nichol vs. Ames, 173 U. S. 509.....	19, 20, 28 30, 31, 32
Nunnemacher vs. Wilkinson, Appendix B	56
Opinion to House of Rep. 208 Mass. 616	23, 26
Osborn vs. Bank, 9 Wheat. 738.....	9
Patton vs. Brady, 184 U. S. 608.....	34, 51
People vs. Commissioners, 23 N. Y. 242	46
Plumer vs. Coler, 178 U. S. 115.....	22, 23
Pollock vs. Trust Co., 157 U. S. 583.....6, 7, 9, 33, 38, 39 42, 43, 44, 46, 47	
Pollock vs. Trust Co., 158 U. S. 601.....	33, 38, 42
Postal vs. Adams, 155 U. S. 688.....	28, 29
Powell vs. Pennsylvania, 127 U. S. 678..	23, 24, 47
Reynolds vs. Lexington, 181 Ky. 503....	46

	Page
Rhode Island vs. Doughton, 9 Adv. Op. 355	4, 5, 12
Schlesinger vs. Wisconsin, 9 Adv. Op. 3 15 26, 301	14, 22, 50, 55
Scholey vs. Rew, 23 Wall. 331	33, 34, 40
Schwab vs. Doyle, 258 U. S. 529	52
Shed vs. State, 155 S. W. 524	46
Smith's Wealth of Nations	35, 36
So. Car. vs. United States, 39 Ct. Cl. 527	38, 39
So. Car. vs. United States, 199 U. S. 437	38, 39
Southern Railway Co. vs. Greene, 216 U. S. 400	55
Springer vs. United States, 102 U. S. 586	33, 42
State Freight Tax, 15 Wall. 232	27, 28
State Tax on Foreign held Bonds, 15 Wall. 300	4
Stockdale vs. Ins. Co., 20 Wall. 323	51
Texas Co. vs. Amos, 77 Fla. 327	46
Thomas vs. United States, 192 U. S. 363	32, 34, 38, 39, 40, 45
Thompson vs. Kreutzer, 112 Miss. 165	23, 24, 25, 45
Thompson vs. McLeosi, 112 Miss. 383	23, 25, 45
Towne vs. Eisner, 245 U. S. 418	33
Trust Co. vs. Eisner, 256 U. S. 345	32, 34
Turgot, Taxation	36
United States vs. Ginsberg, 243 U. S. 472	3
United States vs. Phellis, 257 U. S. 168	28, 31
United States vs. Perkins, 163 U. S. 625	22
United States vs. R. R. Co., 17 Wall. 322	6, 7, 10
U. S. Const. IV, Sec. 2, Cl. 1	23
U. S. Const. I, Sec. 2, Cl. 3	27
U. S. Const., Sec. 9, Cl. 4	27, 33, 40
U. S. Judicial Code, Sec. 239	1, 2
U. S. Statutes, Chap. 43, p. 938	2

Page

U. S. Statutes, Act. Mar. 4, 1923,
Chap. 166 27
U. S. Revised Statutes, Sec. 3186..... 27
U. S. Revenue Act, 1924..... 14, 15, 18, 22, 27
41, 42, 53, 58, 62
U. S. Treasury Regulations No. 67,
Art. 45 ..... 15, 16, 27, 28
Van Brocklin vs. Tennessee,
117 U. S. 151 ..... 4, 5, 6, 7, 8
Veazie Bank vs. Fennell, 8 Wall. 533.... 34
Ward vs. Maryland, 12 Wall. 430..... 23, 24
Webster's Dictionary, Business..... 46
Wells, Taxation 36, 37
Welton vs. Missouri, 91 U. S. 275..... 19, 27, 28
Western Union vs. Kansas, 208 U. S. 21 19, 20
West Va. vs. Goodwill, 33 W. Va. 183... 23, 26
Weston vs. Charleston, 2 Pet. 449..... 6, 9, 14
Wynehamer vs. People, 13 N. Y. 378.... 47

UNITED STATES OF AMERICA

The Supreme Court

JOHN W. BLODGETT, Plaintiff-in-Error, vs. CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant-in-Error.	OCTOBER TERM 1926 No. 779

BRIEF FOR PLAINTIFF-IN-ERROR

This is an action brought by plaintiff-in-error to recover "gift" taxes claimed to be due and therefore exacted by defendant-in-error under Sections 319 to 324 of the United States Revenue Act of 1924, approved June 2, 1924. (R. 1)

The decision of the District Court is found in—

Blodgett vs. Holden, 11 Fed. (2nd) 180.

On Writ of Error to the United States Circuit Court of Appeals for the Sixth Circuit, the case was certified to this Court under

U. S. Jud. Code, Sec. 239.

The certificate constitutes the entire record here. (R. 1-3)

II.

The jurisdiction of this Court exists because of such certification, the Circuit Court of Appeals having power to certify and this Court jurisdiction to decide "any questions or propositions of law concerning which instructions are desired for the proper decision of the cause."

U. S. Jud. Code, Sec. 239,
Act of Feb. 13, 1925; 43 Stat. 938.

The date of the judgment in the District Court (not given in record) was February 17, 1926.

III.

STATEMENT OF CASE.

The facts are undisputed. (R. 1)

During the calendar year 1924, plaintiff in error gave away property of the value of $872,695.66 (R. 1) made up of the following items:

Charitable and public gifts, exempt from tax,	$ 21,899.64
State and Municipal bonds,	818,086.02
And other	32,110.00
	$872,695.66 (R. 1)

Of the total not exempt as charitable, etc., $843,686.02 was donated prior to the enactment of the gift tax, and $6,589.02 thereafter. (R. 1)

The tax paid and sought to be recovered was computed thus:

Total gifts,		$872,095.66	
LESS charitable gifts exempt,	$21,899.64		
LESS specific exemption allowed by law	50,000.00	71,899.64	
Balance claimed to be taxable,		$800,196.02	(R. 2)
Amount of tax paid,		$52,023.52	(R. 2)

It is apparent that the total tax was levied on a gift of securities which plaintiff in error claims the United States had no jurisdiction to tax; and also on gifts made at a time prior to the existence of any "gift" tax, and therefore on an isolated act which had been done when no tax on that act existed. (R. 1-2)

IV.

ARGUMENT.

The Court of Appeals has certified three questions (R. 2-3).

The third question is first discussed because if plaintiff in error's contention in regard to that is correct, decision of the remaining two questions is unnecessary.

1916. U. S. vs. Ginsberg, 243 U. S. 472.

FIRST

The United States has no jurisdiction to tax transfers by gift of securities issued by a state or political subdivisions thereof, for public uses, when such transfers are made inter vivos and not in contemplation of death.

A.

The certificate *shows that the entire* tax exacted and paid was on a transfer by gift of securities issued by states or political subdivisions thereof, for public uses; (R. 1, 3) that the gift was inter vivos (R. 2) and not in contemplation of death (R. 2). This undisputed (R. 1).

B.

If this tax is beyond the taxing jurisdiction of the United States, discussion as to whether it is "direct", "indirect", "supplemental" or "corrolary" is vain. No matter what it is called, it is void.

C.

It is elementary that the subject taxed must be within the jurisdiction of the taxing power.

Cooley on Taxation, 4th Ed. Sec. 57, 86, 92,
1872. State Tax on Foreign held Bonds, 15 Wall. 300, 319,
1885. Van Brocklin vs. Tenn. 117 U. S. 151, 155,
1906. Home Sav. Bank vs. Des Moines, 205 U. S. 503, 513,
1925. Frick vs. Pennsylvania, 268 U. S. 473, 489,
1926. Rhode Island etc. vs. Doughton, 9 Adv. Op. U. S. Sup. Ct. p. 355, decided March 1, 1926,
1926. Bank vs. Doughton, Adv. Op. U. S. Sup. Ct. No. 4, Dec. 15, 1926, p. 250.

In *State Tax on Foreign-held Bonds* the Court said, p. 319:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state."

In *Home Sav. Bank vs. Des Moines*, this Court said:

> "The State cannot by any form of taxation impose

any burden upon any part of the national public debt. The Constitution has conferred upon the Government power to borrow money on the credit of the United States and that power cannot *be burdened or impeded* or in any way affected by the action of any State." p. 513.

In *Van Brocklin vs. Tenn.* the Court said, page 155:

"All subjects over which the sovereign power of the state extends are objects of taxation; but those over which it does not extend are upon the soundest principles exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission."

In *Frick vs. Pennsylvania* this Court (p. 492) speaking of the distinction between a "property tax" and "one laid on the transfer of property on the death of the owner," said:

"But to impose either tax, the State must have jurisdiction over the thing that is taxed and to impose either without such jurisdiction is mere extortion and in contravention of due process of law."

Rhode Island, Etc., vs. Doughton is the case in which it was held that the State of North Carolina could not lawfully levy inheritance taxes on the stock of a New Jersey corporation (which owned property and was doing business in the State of North Carolina) because such stock was not within the jurisdiction of the state. At page 357 the Court said:

"The tax here is not upon property but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a *transfer tax* as in that of a property tax. The state has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred." (Italics ours)

A.

The certificate shows that the entire tax exacted and paid was on a transfer by gift of securities issued by states or political subdivisions thereof, for public uses; (R. 1, 3) that the gift was inter vivos (R. 2) and not in contemplation of death (R. 2). This undisputed (R. 1).

B.

If this tax is beyond the taxing jurisdiction of the United States, discussion as to whether it is "direct", "indirect", "supplemental" or "corrolary" is vain. No matter what it is called, it is void.

C.

It is elementary that the subject taxed must be within the jurisdiction of the taxing power.

Cooley on Taxation, 4th Ed. Sec. 57, 86, 92.
1872. State Tax on Foreign held Bonds, 15 Wall. 300, 319.
1885. Van Brocklin vs. Tenn. 117 U. S. 151, 155.
1906. Home Sav. Bank vs. Des Moines, 205 U. S. 503, 513.
1925. Frick vs. Pennsylvania, 268 U. S. 473, 489.
1926. Rhode Island etc. vs. Doughton, 9 Adv. Op. U. S. Sup. Ct. p. 355, decided March 1, 1926.
1926. Bank vs. Doughton, Adv. Op. U. S. Sup. Ct. No. 4, Dec. 15, 1926, p. 250.

In *State Tax on Foreign-held Bonds* the Court said, p. 319:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state."

In *Home Sav. Bank vs. Des Moines*, this Court said:

> "The State cannot by any form of taxation impose

any burden upon any part of the national public debt. The Constitution has conferred upon the Government power to borrow money on the credit of the United States and that power cannot be burdened or impeded or in any way affected by the action of any State." p. 513.

In *Van Brocklin vs. Tenn.* the Court said, page 155:

"All subjects over which the sovereign power of the state extends are objects of taxation; but those over which it does not extend are upon the soundest principles exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission."

In *Frick vs. Pennsylvania* this Court (p. 492) speaking of the distinction between a "property tax" and "one laid on the transfer of property on the death of the owner," said:

"But to impose either tax, the State must have jurisdiction over the thing that is taxed and to impose either without such jurisdiction is mere extortion and in contravention of due process of law."

Rhode Island, Etc., vs. Doughton is the case in which it was held that the State of North Carolina could not lawfully levy inheritance taxes on the stock of a New Jersey corporation (which owned property and was doing business in the State of North Carolina) because such stock was not within the jurisdiction of the state. At page 357 the Court said:

"The tax here is not upon property but upon the right of succession to property, but the principle that the subject to be taxed must be within the jurisdiction of the state applies as well in the case of a *transfer tax* as in that of a property tax. The state has no power to tax the devolution of the property of a non-resident unless it has jurisdiction of the property devolved or transferred." (Italics ours)

Bank vs. Doughton, was a case similar to the last, the transfer being by will made in North Carolina of property situated in Massachusetts and governed by the transfer laws of that State.

This Court said, p. 252:

> "A state may not subject to taxation things wholly beyond her jurisdiction or control."

D.

It is settled that the United States has no jurisdiction to tax the powers, the operations or the property of the states or their governing and assisting agencies.

1870 Collector vs. Day, 11 Wall. 113, 124,
1872 U. S. vs. R. R. Co., 17 Id. 322, 332,
1886 Van Brocklin vs. Tenn., 117 U. S. 151,
1887 Bank vs. N. Y., 121 U. S. 138, 162,
1894 Pollock vs. Trust Co., 157 U. S. 583, 586,
1896 Grether vs. Wright, 23 C. C. A. 496, 509 514, Op. by Mr. Ch. J. Taft, Note p. 515, 525, et seq.
1919 Evans vs. Gore, 253 U. S. 255.

Collector vs. Day decided that the United States had no jurisdiction to tax the salary of a state judge. The reason for so holding is based on:

McCullough vs. Maryland, 4 Wheat, 316,
Weston vs. Charleston, 2 Pet. 449,
Dobbins vs. Erie Co., 16 Pet. 435,

and is (p. 125):

> "That the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government."

U. S. vs. Railroad Company decided that the United States had no jurisdiction to tax the income derived by a state municipality from its property invested in railroad bonds. The holding is put on the following grounds (p. 327):

> "The right of the States to administer their own affairs through their legislative, executive and judicial departments in their own manner through their own agencies is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed if any interference is permitted. Hence the *beginning of such taxation* is not allowed on the one side, is not claimed on the other." (Italics ours)

In *Van Brocklin vs. Tennessee*, the Court in holding United States property exempt from taxation by the State, said (p. 155):

> "All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are upon the soundest principles exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission."

State bonds do not exist by U. S. authority; nor are they introduced by its permission.

In *Bank vs. New York* the Court (p. 162) said:

> "Bonds issued by the State of New York or under its authority by its public municipal bodies are means for carrying on the work of the government and are not taxable even by the United States."

In *Pollock vs. Trust Co.*, 157 U. S. 586, the Court in de-

ciding that the United States had no jurisdiction to levy income tax on income from state and municipal bonds said (p. 583):

> "Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. * * * The Constitution contemplates the independent exercise by the Nation and the State severally of their constitutional powers. As the states cannot tax the powers, the operations or the property of the United States nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of the state. A municipal corporation is the representative of the state and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Collector vs. Day*, 11 *Wall.* 124; *U. S. vs. R. R. Co.*, 17 *Wall.* 322, 332."

The Court then reviewed *Collector vs. Day*, *Dobbins vs. Commissioners*, 16 *Pet.* 435; *Van Brocklin vs. Tenn.*; *U. S. vs. R. R. Co.*, *Mercantile Co. vs. N. Y.*, 121 *U. S.* 138, 162, and after so doing, proceeds (p 585):

> "But we think the same want of power to tax the property or revenues of the states or their instrumentalities exists in relation to a tax on the income from their securities and for the same reason, and that reason is given by Chief Justice Marshall in *Weston vs. Charleston*, 2 *Pet.* 449, 468, where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden upon the operations of government. It may be carried to an extent which shall arrest them entirely. The tax on government stock is

thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.' Applying this language to these municipal securities, it is obvious that the taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the states and their instrumentalities to borrow money, and consequently repugnant to the Constitution."

In deciding this point the Court was unanimous.

The reasons for the rule stated are analyzed and reviewed by Mr. Ch. J. Taft in *Grether vs. Wright*, and the cases on the right of the United States to tax state agencies and securities and on the reciprocal right of the states to tax United States agencies and securities are collected in a note to that case (p. 515). This case involved the attempted taxation by Ohio of District of Columbia bonds.

The rule is restated and recognized in *Evans vs. Gore* (p. 255) in which it was held that Congress could not tax the salary (income) of United States Judges.

E.

The exclusion from the jurisdiction of the taxing powers of the Congress of state agencies and securities, is conversely applied in equal measure in excluding from the jurisdiction of the taxing powers of the states the agencies and securities of the United States.

1819 McCullough vs. Md., 4 Wheat, 316, 436,
1824 Osborn vs. Bank, 9 Wheat. 738,
1829 Weston vs. Charleston, 2 Pet. 449,
1862 Bank vs. New York, 2 Black, 620,
1864 Bank Tax Case, 2 Wall. 200,
1868 Banks vs. Mayor, 7 Wall. 16,
1868 Bank vs. Supervisors, 7 Wall. 26,

1896 Grether vs. Trust Co., 23 C. C. A. 498, and note p. 515,
1913 Farmers & Mech. Bk. vs. Minn., 232 U. S. 516,
1921 Gillespie vs. Oklahoma, 257 U. S. 501,
1922 Federal L'd. Bank vs. Crosland, 261 U. S. 374,
1926 Metcalf vs. Mitchell, Adv. Op. Feb. 1, 1926, p. 185.

F.

If there is any question of United States jurisprudence which is settled beyond controversy, it is this. The history disclosed in the cases cited shows attempts on the part of the states to tax—even to a prohibitive extent—the instrumentalities of the United States, and *vice versa*. Invariably the Supreme Court has held such attempts unconstitutional. It has applied the principle *obsta principus*.

G.

The extent to which the principle *obsta principus* has been applied is well illustrated by the decisions of this Court.

1913. Farmers Bank vs. Minn., 232 U. S. 516, 526,
1914. Choctaw vs. Harrison, 235 U. S. 292,
1920. Johnson vs. Maryland, 254 U. S. 51,
1921. Gillespie vs. Okla., 257 U. S. 501,
1922. Bank vs. Calif., 262 U. S. 366, 370,
1926. Jaybird vs. Weir, adv. Op., July 1, 1926, 675,
1872. U. S. vs. R. R. Co., 17 Wall. 322, 332, quoted *ante*, p 7,
1927. Miller vs. Milwaukee, Jan. 3, 1927, Adv. Op., p. 346.

Farmers Bank vs. Minnesota was a case where the State levied a tax on the surplus of a Savings Bank, in which surplus was included the value of certain bonds issued by municipalities originally organized under laws of the territory of Oklahoma.

It was held this was taxing a Federal agency and invalid. At page 526, this Court said:

"But we deem it entirely clear that a tax upon the exercise of the function of issuing municipal bonds is a tax upon the operations of the government and not in any sense a tax upon the property of the municipality. And to tax the bonds as property in the hands of the holders, is in the last analysis to impose a tax upon the right of the municipality to issue them."

Choctaw vs. Harrison is a case where Oklahoma levied a tax on the gross revenue derived by a corporation employed by the United States in mining coal from Indian lands pursuant to treaty obligations of the United States. It was held that the corporation was a United States agent, that the tax was an occupation or privilege tax on a governmental agent, and as such invalid.

Johnson vs. Maryland was a case where an employee of the United States Post Office was arrested, convicted and fined for driving a Post Office motor car carrying United States mail without passing a Maryland examination as to his competency, paying a Maryland tax, and obtaining a Maryland license. It was held to be an unlawful interference with a Federal agent.

Gillespie vs. Oklahoma holds that a state may not levy income taxes on income derived from operating oil wells on Indian lands under government leases, the lessee being in that case a government agent, used to perform a governmental duty to the Indians.

Bank vs. California was a case in which California undertook to escheat bank deposits intact and unclaimed for twenty years. This was held void when applied to National Banks as it impaired the efficiency of a United States agency. The Court said, p. 370:

"The approved principle of *obsta principiis* should be adhered to."

Jaybird vs. Weir holds ore taken by a lessee from restricted Indian lands cannot be taxed by a state while in possession of a governmental agent and undivided.

Miller vs. Milwaukee holds that a state may not tax income from United States bonds, even though such income is in the form of dividends distributed by a corporation which was the original recipient of the interest paid by the United States.

II.

These cases well illustrate how closely and consistently this Court has adhered to the rule that states may not in any manner by taxation interfere with United States government agencies.

The converse, that the United States may not by taxation interfere with state agencies is equally true.

That issuance of state and municipal bonds is an exercise of the powers of state agencies is a proposition too well settled to need discussion. The United States cannot tax the bonds—the subject transferred—because it has no jurisdiction to do so.

And in

1926. Rhode Island vs. Doughton, Adv. Op. Mar. 15, 1926, p. 355, 357, quoted *ante* p. 5,

this Court decided that if the *subject transferred* was not within the jurisdiction of the taxing power, the *transfer* of that subject was equally beyond the jurisdiction.

A like principle was decided in—

1925. Frick vs. Pennsylvania, quoted *ante* p. 5.
1927. Bank vs. Doughton, quoted *ante* p. 6.

Certainly—within all the decisions—the property transferred in this case was not within the taxing jurisdiction

of the United States. If, as decided in the *Frick and Doughton cases*, it is necessary to transfer tax that the taxing power have jurisdiction of both the transfer and the property transferred, then this tax is void for want of jurisdiction.

I.

It is urged that this tax may be sustained:

1. Because it does not interfere with the governmental functions of states or state agencies; or conversely, if applied by states, with governmental functions of the United States or its agencies.

2. Because this Court has sustained "transfer" taxes on both United States and State securities when the transfer was occasioned by "death" or made "in contemplation of death."

J.

The learned District Judge was of opinion:

> "That the excise tax here in question does not impair in any substantial manner the exercise of the governmental power of the States." 11 Fed. (2nd) 180.

Apparently the learned Judge thought that this "gift" tax was likely to fall on few, because few make gifts and the statutory exemption is so large that but few donors would be taxed and therefore the borrowing powers of the States and their agencies would not be impaired by *this* tax.

Such contention fails wholly to meet the case. The question is one of *kind*, not of *degree*. If the power to tax exists it may be exercised to an unlimited extent and affect every gift of state and municipal securities. If it can be

levied on donor it may be on donee and on the transferred property. If the United States can levy it on state securities the States may levy a like tax to an unlimited extent on United States securities. If such a tax may be levied on "transfers by gift" why not on "transfers by sale," and then what will become of the entire doctrine of non-interference by one government with the securities of the other?

Any tax, in any form or under any name, which *may* affect the borrowing powers of states and their governing agencies, is beyond the jurisdiction of the United States taxing power.

1829. Weston vs. Charleston, 2 Pet. 449, 468, quoted *ante* p. 8.
1913. Bank vs. Minnesota, 232 U. S. 516, 526, quoted *ante* p. 11.

Nor can a tax levied without jurisdiction be sustained as supplemental or corrolary to the Estate or Income Tax. A legal tax cannot be aided or its evasion prevented by levying an illegal one.

1925. Schlesinger vs. Wisconsin, 270 U. S. 230, 240.

Besides, the record shows affirmatively that in this case there was no attempt at evasion. (R. 2 fol. 2).

K.

That this tax must have a detrimental effect upon the market and value of state and municipal securities seems clear.

1. The tax is imposed "upon the transfer * * * by gift * * * of any property wherever situated whether made directly or indirectly."

Revenue Act 1924, Sec. 319.

2. Section 324 of the Revenue Act of 1924 is as follows:

"The tax imposed by Section 319 shall be paid by the donor on or before the fifteenth day of March and shall be assessed, collected and paid in the same manner and subject insofar as applicable, to the same provisions of law as the tax imposed by Section 301."

3. Section 301 is the Estate Tax, the provisions of which are by Section 319 made applicable to the Gift Tax.

By the provisions of the Estate Tax the entire estate is subjected to the tax and the tax becomes a lien on such estate for a period of ten years. Legatees, devisees and heirs at law are liable to pay the estate tax to the extent of the portion they receive, so that the tax follows, is a lien on and must be paid from the property transferred.

Applying this provision, as made applicable to the Gift Tax, makes the donee liable to pay the Gift Tax to the extent of the property received, subjects the donated property to a lien for the entire tax, and compels donee, if donor cannot or does not, to pay out of the value donated.

Accordingly, Treasury Regulations No. 67, Article 45, provided as follows:

"Art. 45. *Property subject to lien.*—This lien attaches to all the property of the donor, to the extent of the tax shown to be due by the return and of any deficiency tax, interest, and ad valorem penalty found to be due upon audit and review of the return. The lien also attaches to any property constituting the gift.

"Where the donor transferred or placed in trust any property by gift, a lien attaches thereto as stated in the preceding paragraph, and the donee or trustee is personally liable for the tax.

"Where the donee or trustee sells the property to a bona fide purchaser for a fair consideration in money or money's worth, the lien upon the property is divested, but there is substituted a like lien upon all the

property of the donee or trustees, except such thereof as may be sold to a bona fide purchaser for a fair consideration in money or money's worth. .

"The lien upon the entire property constituting gifts or upon the property of the donor continues for a period of 10 years after the gift, or gifts, except—

"(1) Where the tax is paid in full before the expiration of such period;

"(2) In case of the donor's death, such portion of his estate as is used for the payment of charges against the estate, and expenses of its administration, allowed by any court having jurisdiction thereof;

"(3) Such of the property constituting the gift as has been sold by the donee or trustee to a bona fide purchaser for a fair consideration in money or money's worth; or

"(4) Where the commissioner issues his certificate releasing such lien."

4. The effect of these provisions is to subject the donor to a tax for giving away state and municipal securities, which securities are outside the jurisdiction of the United States. This tax donor must pay from his remaining property or income. If he has no property or income left, or fails to pay, then the tax falls directly on the donee and the property donated, and in any event the donated property itself is subjected to a ten year lien for the amount of the tax. It is also manifest that if donee may be made secondarily liable for this tax, he may be made primarily liable, in which event the tax must fall directly on the donated property. In addition, donor is subjected to the expense and annoyance of making return of his gifts, under heavy penalty for neglect or refusal. He may even be subjected to criminal charges. And all this because of his giving away property jurisdiction to tax which is beyond the taxing power of the United States.

If this tax is upheld, then every State, municipal and Federal bond, no matter how small its amount, may be subjected to "gift" tax—state and municipal bonds by the United States and United States bonds by the various states. In such event, a series of complications would arise which would inevitably have a disastrous effect upon the market values of both classes of securities.

To go more into detail, as to the possible effect of this tax as applicable to state and municipal securities.

Donor possessed certain property *which was beyond the taxing power of the United States.* Exercising an inherent right of property, viz., the right of disposition—he gives this property to another. The consequences are:

1. A tax—which may be unlimited in amount—measured by the value of the non-taxable property given, is imposed on donor.

2. A lien is created—for ten years—on donor's remaining property, if any he has.

3. Donor must make a complicated return, possibly incur considerable expense to ascertain and establish—to the satisfaction of Treasury Agents—the value of the securities donated.

4. Until all Treasury red tape is unwound and the tax is paid all his property is under lien and subject to seizure.

5. If the gift be small, the cost of making return, satisfying the Treasury Department and obtaining release of lien, may exceed the value of the gift.

6. The donee—of this exempt property—is in like case and worse.

(1) He is liable to pay the tax, which may exceed the value of the gift.

(2) In his case the tax falls directly on the property given and as the Treasury Department asserts a personal liability against him for the *amount of the tax*, he may not only obtain nothing from the gift but may lose by its acceptance.

(3) His property is subjected to lien, distraint, etc.

(4) And he, to the expense and annoyance of satisfying the Treasury Department as to value, etc.

(5) A ten year lien imposed on state securities and their proceeds certainly will affect their value.

There is no logical distinction between taxing a "transfer by gift" and taxing a "transfer by sale". If this tax is sustained, a tax on "transfers by sale" will surely follow and the whole doctrine of the exemption of United States securities from state taxation and of State securities from United States taxation, will go to the trash pile. The consequences may be left to imagination.

Again we urge that this is not a question of the magnitude of *this* "gift" tax under *this* law; it is a question of the power to levy it at all.

I.

The statute, the material parts of which are printed in full in Appendix A, purports to be "upon the * * * transfer by gift".

Rev. Act 1924, Sec. 319

The transfer passes title. A transfer by "gift" differs in no way from a transfer by "sale" except that in the one case the consideration is, in law, regarded as "good" and in the other case as "valuable".

A tax on a transfer by sale is a tax on the thing sold.

1827. Brown vs. Maryland, 12 Wheat. 419, 444,
1875. Welton vs. Missouri, 91 U. S. 279,
1878. Cook vs. Pennsylvania, 97 U. S. 566, 573,
1898. Nichol vs. Ames, 173 U. S. 509, 521,
1900. Fairbank vs. U. S., 181 U. S. 297,
1907. Burke vs. Wells, 208 U. S. 21, 22,
1909. Western Union vs. Kansas, 216 U. S. 32,
1920. Dawson vs. Kentucky, 255 U. S. 292.

In *Brown vs. Maryland*, page 444, the Court said in relation to the license tax levied on importers of foreign goods and others selling the same by wholesale:

> "But should it be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article but upon the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

Welton vs. Missouri was this: A statute of Missouri required the payment of a license tax by persons dealing in the sale of merchandise not the growth, produce or manufacture of the State of Missouri. This tax was held to be a tax on the goods. In the opinion of the Court, pages 278, 279, Brown vs. Maryland is cited, and the Court says, page 279:

> "So, in like manner the license tax exacted by the state of Missouri from dealers in goods which are not the product or manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves."

Cook vs. Pennsylvania was this: Pennsylvania had imposed a tax on sales by auction of foreign drugs, glass, earthenware, marble works and die works, three-fourths of one per cent, the tax being on the gross amount of the proceeds of the sales.

On page 573 the Court quoted and approved Brown vs. Maryland and Welton vs. State of Missouri, and said:

> "The tax on sales made by an auctioneer is a tax on the goods sold, within the terms of this last decision, and, indeed, within all the cases cited; and when applied to foreign goods sold in the original packages of the importer before they have become incorporated into the general property of the country, the law imposing such tax is void as laying a duty on imports."

Nichol vs. Ames involved the stamp tax on sales at any exchange or board of trade or other similar place. Page 521 the Court said:

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property."

In *Fairbanks vs. U. S.*, a stamp tax on a foreign bill of lading was held to be in substance and effect a tax on the articles included in the bill of lading, following the decisions in Brown vs. Maryland and similar cases.

In *Burke vs. Wells* the same rule was followed so far as goods in original packages were concerned, but it was held that after the articles imported had lost their distinctive character and had been mingled with other property, they then became subject to taxation by the states.

In *Western Union Telegraph Co. vs. Kansas*, Kansas had imposed a charter fee upon the capital stock of the

Western Union Telegraph Company, a New York corporation. This was held to be a tax on interstate commerce and not a mere franchise fee for the right to do business in the State of Kansas. Page 32, the principle decided in Brown vs. Maryland and similar cases was cited and approved as determining the question.

In *Dawson vs. Kentucky* the State of Kentucky had imposed a tax of 50c a gallon as an annual license tax on persons engaged in the business of owning and storing whiskey in bonded warehouses. This was held to be a tax on the property stored and invalid. The Court cited Thompson vs. Kreutzer and Thompson vs. McLeod, 112 Mississippi.

Cited and quoted *post*, pages 24, 25.

If a tax on transfer by sale is a tax on the property sold, why is not a tax on the transfer by gift a tax on the property given?

The learned District Judge seeks to distinguish between these two transfers because of the fact that one is for a consideration and the other is gratuitous, and he also asserts that the tax on the transfer by gift falls after the transaction is completed and title to the thing given has passed.

The distinction sought to be made has no real existence.

A tax on a sale falls after the transaction is complete and title has passed, exactly as in case of a transfer by gift.

In the matter of consideration there is no real distinction. Each is a transfer of title. Each has a consideration. One a material one, of the goods of this world. The other an immaterial one, such as the gratification of the impulses of love and affection, or the desire to promote the material welfare of those dear to us.

No logic can successfully distinguish between the practical operation and effect of these two kinds of transfers; nor does the gift tax act attempt any such distinction. On the contrary, it puts both transfers in the same class and if the sale is made for an inadequate consideration "in money or money's worth" (Sec. 320) taxes the sale and gift alike.

M.

The learned Judge and the counsel for defendant in error argue in support of this tax that inasmuch as "death" taxes based on United States, state and municipal securities have been held valid, this tax must be, and the learned Judge regards this tax as a supplement or corrolary to the United States Estate and Income Taxes intended to prevent evasion of those taxes.

Whether supplemental, corrolary, or not, if power is wanting because of lack of jurisdiction, a supplemental tax is as illegal as any other tax. This was decided in—

1926 Schlesinger vs. Wisconsin, Adv. Op. March 15, 1926, p. 301, 303.

The right to levy "death" taxes is not in any way controlling here. The law of the United States controls here, South Dakota cases relied on by the learned Judge to the contrary notwithstanding. It is United States law that a "death" tax is not a tax upon persons or upon property.

1896 U. S. vs. Perkins, 163 U. S. 625, 629, 630,
1899 Knowlton vs. Moore, 178 U. S., 47, 54, 55, 82, 83,
1900 Plumer vs. Coler, 178 U. S. 115, 131,
1906 Home Sav. Bank vs. Des Moines, 205 U. S. 516.

A "death" tax is a payment exacted by the state as a condition for allowing the heir or legatee to succeed to the

property abandoned by the dead and which property in the absence of statutory law belonged to no one and was subject to appropriation by the finder. In other words, it is a tax on a privilege conferred by the state and which privilege the state may condition as it sees fit. This privilege existing by State law, the U. S. may tax.

1897 Magoun vs. Bank, 170 U. S. 288,
1900 Plumer vs. Coler, 178 U. S. 115.

But transfer of property from the living to the living is not a matter of privilege. It is a common right guaranteed by all our constitutions.

U. S. Const. Art. IV, Sec. 2, Cl. 1,
1870 Ward vs. Maryland, 12 Wall. 430,
1917 Buchanan vs. Warley, 245 U. S. 60,
12 C. J. p. 945, Sec. 459,
1887 Powell vs. Penn. 127 U. S. 678, 684,
1916 Thompson vs. Kreutzer, 112 Miss. 165,
1916 Thompson vs. McLeod, 112 Miss. 383.

The last two cases were cited with approval in Dawson vs. Ky., 255 U. S. 292.

1898 Chicago vs. Collins, 175 Ill. 445,
1904 Montgomery vs. Kelly, 142 Ala. 552, 556,
1911 Opinion to House of Representatives, 208 Mass. 616, 619,
1889 W. Va. vs. Goodwill, 33 W. Va. 183.

In *Ward vs. Maryland*, the question was as to the right of the State of Maryland to require traders resident within the state to take out licenses and pay therefor certain sums, and made it a penal offense for any person not a permanent resident to sell, offer for sale or expose for sale any goods, wares or merchandise not the product of Maryland without first paying a license therefor. This was held to be a discriminating tax upon non-resident traders and repugnant to the Constitution and void.

At page 430, the Court, in speaking of the privileges and immunities guaranteed by the Constitution, said:

> "Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the state; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

In *Powell vs. Pa.*, page 684, the defendant contended that the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment. It was said, page 684:

> "The Court assents to this general proposition as embodying a sound principle of constitutional law."

In *Buchanan vs. Warley*, the question was as to the validity of an ordinance forbidding the owner of property to sell the same to a colored person. The Court said, page 74:

> "The Fourteenth Amendment protects life, liberty and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property. *Holden vs. Hardy*, 169 *U. S.* 366, 391. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or, diminution, save by the law of the land."

Thompson vs. Kreutzer was this: A Mississippi statute levied "an annual privilege tax or occupation fee * * * upon each person * * * pursuing the business of buying,

owning or holding more than one thousand acres of timber land."

On a bill to enjoin the collection of this tax, the Court held that it was a "property" and not a "privilege" tax and unconstitutional. The state claimed it was a "tax upon the privilege of ownership."

The Court said, page 167:

> "Ownership is not a privilege conferred by government but is one of the rights which governments were organized to protect."
>
> "A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of a thing is a tax on the thing itself. So that a tax on a thing owned is necessarily a tax on the right of ownership thereof; and a tax on the right ownership of a thing is necessarily a tax on the thing itself. No definition of property can be framed which does not include the right of ownership. Consequently no tax can be imposed on the right of ownership which is not also a tax on property."

1916 *Thompson vs. McLeod*, 112 *Miss.* 383. A Mississippi statute levied "an annual privilege tax or occupation fee on all persons * * * pursuing the business of extracting turpentine from standing trees."

On a bill to enjoin the collection of the tax, Held, a property tax and invalid. The Court said, page 388:

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent to the right of the owner to pull the ripe pecans from his pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

These two cases are cited with approval in *Dawson vs. Kentucky*, 255 *U. S.* 292.

1898 *Chicago vs. Collins*, 175 *Ill.* 445, is authority to the effect that a right free and open to all cannot be made the subject of a license or privilege tax.

1904 *Montgomery vs. Kelly*, 142 *Ala.* 552, 556, is to the same effect.

1911 *Opinion to House of Representatives*, 208 *Mass.* 616, 619, holds that Massachusetts cannot levy "excises" on "mere ownership" of property.

1889 *West Va. vs. Goodwill*, 33 *W. Va.* 183, is authority to the effect that the right to use and dispose of property is of common right and is not a "privilege."

N.

From the beginning of our Government under the Constitution, this Court has invariably protected United States agencies and securities against the effort of the States to tax them, and State agencies and securities against similar effort by the United States.

The rights of the United States and of the States in this regard are equal. If this tax is sustained, every gift of State securities, no matter how small, may be taxed by the United States and every gift of United States securities may be taxed by the States. Tax liens may be fastened on every such security, the right of disposition impaired and their marketability affected. The functioning of the United States and the States will be "embarrassed or destroyed".

1919. Evans vs. Gore, 253 U. S. 256.
1874. Loan Assn. vs. Topeka, 20 Wall. 663, 664.

The mere fact that a lien is placed in favor of the United States on the property donated—

Rev. Act. 1924, Sec. 324, 315,
Treas. Reg. No. 67, Art. 45,
Rev. Stat. Sec. 3186, as amended Mar. 1, 1879, Chap. 125, Sec. 3,
Act. Mar. 4, 1923, Chap. 166,

certainly amounts to an "embarrassment," and may amount to destruction.

SECOND.

A.

This "gift" tax is an unapportioned "direct" tax and therefore in contravention of—

U. S. Const. Art. I Clause 3, Sec. 2, and
Clause 4, Sec. 9 (R. 2, Ques. (1).)

and for that reason void.

B.

That the tax is "unapportioned" is undisputedly shown by the act itself.

See Appendix.

If, therefore, the tax is "direct" within the meaning of the Constitution, it must be declared void.

C.

In considering this question it matters not that the statute calls the "gift" tax a tax "upon the transfer * * * by gift." Substance, not form, is controlling. The Court will look behind the form and determine the substance.

1827 Brown vs. Maryland, 12 Wheat, 419, 444,
1872 State Freight Tax, 15 Wall. 232, 272,
1875 Welton vs. Missouri, 91 U. S. 275, 278,
1886 Fargo vs. Michigan, 121 U. S. 230,

1894 Postal vs. Adams, 155 U. S. 688, 698,
1898 Nichol vs. Ames, 173 U. S. 509, 515, 516,
1910 Flint vs. Stone-Tracy Co., 220 U. S. 107,
1915 Kansas City vs. Botkin, 240 U. S. 227, 231,
1920 Dawson vs. Ky. Distilleries Co., 255 U. S. 288, 292,
1921 U. S. vs. Phellis, 257 U. S. 168.

In *Brown vs. Maryland*, the State of Maryland had imposed on all importers of foreign goods by the bale or package, and on other persons selling the same by wholesale, bale or package, a license tax of $50.00. This was held to be an infringement of the Constitutional provision that "no state shall, without the consent of Congress, lay any impost or duty on imports or exports except what may be absolutely necessary for executing its inspection laws," and also an infringement of the power of Congress to regulate commerce between the states and with foreign nations. The Court, speaking by Mr. Chief Justice Marshall, page 444, said:

> "But should it be proved that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the particular thing. All must perceive that a tax on the sale of an article imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business."

The tax was held invalid.

In the case of the *State Freight Tax*, Mr. Justice Strong, in the opinion of the Court, said, page 272:

"It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of Bank of Commerce vs. New York City, the Bank Tax Case, Society for Savings vs. Coite, and Provident Bank vs. Massachusetts."

In *Welton vs. State of Missouri*, the State of Missouri had imposed a license tax upon persons who dealt in the sale of goods, wares and merchandise not the growth, produce or manufacture of the state. It was sought to support the tax by calling it a tax upon the calling or profession. The Court held that a license tax required for the sale of goods was in fact a tax upon the goods themselves no matter what it was called.

In the case of *Fargo vs. Michigan*, the State of Michigan had levied a tax upon the gross receipts of railroads as a tax upon the business transacted within its borders. It was held that the tax was a tax on interstate commerce, although limited by its terms to a tax on business transacted within the State of Michigan.

In *Postal vs. Adams*, the State of Mississippi imposed upon the Postal Telegraph Company certain taxes which the Telegraph Company claimed were burdens on interstate commerce. The Court examined the tax and determined that it was a tax upon the property of the Telegraph Company within the jurisdiction of the State of Mississippi and not a tax upon interstate commerce, and on page 698, in the opinion of the Court, they say in determining this question:

"The substance and not the shadow determines the validity of the exercise of the power."

In *Nichol vs. Ames*, the question arose over the Act of

Congress of June 13, 1908, taxing sales of property on boards of trade or stock exchanges. This was contested as a direct tax. On page 516, the Court said:

> "Taxation is eminently practical and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity the tax should be regarded in its actual, practical results rather than with reference to those theoretical or abstract ideas whose correctness is a subject of dispute and contradiction among those who are experts in the science of political economy."

In *Flint vs. Stone Tracy Company*, the law involved was the Corporation Tax of 1909, which was styled in the Act itself an excise tax. The Court said, page 145:

> "While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, nevertheless, the declaration of the law making power is entitled to much weight."

In *Kansas City, Etc., vs. Botkin*, Kansas had imposed on domestic corporations an annual franchise fee, which was claimed to burden interstate commerce. Held it did not.

Page 235, the Court said:

> "Undoubtedly a tax may be in form a privilege tax and yet in substance may be a tax on property."

Page 231:

> "Decision must regard the substance of the exaction —its operation and effect as enforced—and cannot depend upon the manner in which the taxing scheme has been characterized."

In *Dawson vs. Ky. Distilleries Co.*, Kentucky had levied on every person engaged "in the business of owning and storing" whiskey an "annual license tax" of 50c per gallon

on all whiskey withdrawn or transferred in bond from Kentucky to another state.

This was attacked as a "property" tax and unconstitutional under the Kentucky Constitution.

The Court said, page 292:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents."

and held it to be a property tax.

U. S. vs. Phellis arose under the income tax law of 1913.

Page 168, the Court said:

> "We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder. In a number of cases * * * we have under varying conditions followed the rule."

D.

As the word "direct" is used with reference to taxation, in the Constitution of the United States, there is no precise definition authorized by this Court, which will differentiate in all cases between a "direct" tax and a "duty impost or excise," which are "indirect."

In *Nichol vs. Ames*, 173 *U. S.* 509, 516, the Court said after commenting upon the constitutional provisions as to "direct" and other taxes:

> "In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a par-

ticular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax, it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, the court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it."

In *Knowlton vs. Moore*, 178 *U. S.* 82, 83, the question was as to the validity of taxation by the United States of inheritances, and it was claimed that a tax on inheritances was a direct tax. The opinion quotes with approval the foregoing quotation from Nichol vs. Ames.

In *Thomas vs. U. S.*, 192 *U. S.* 363, the question arose over the law requiring revenue stamps upon memorandum of sale of stock. The opinion of the Court says:

"There is no occasion to attempt to confine the words, duties, imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed upon importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

In *Trust Co. vs. Eisner*, 256 *U. S.* 345, 349, the question arose over the estate tax. In considering this question, the Court held that the matter had been disposed of by the decision in Knowlton vs. Moore, saying in regard to the estate tax being a direct tax:

"But that matter also is disposed of by Knowlton vs. Moore, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise

because of the particular occasion which gives rise to its levy'. 178 U. S. 81-83. Upon this point a page of history is worth a volume of logic."

E.

Notwithstanding the refusal of the Court to formulate any precise definition of the difference between "direct" and other taxes, such differences are known to the Constitation of the United States.

DIRECT TAXES.

(a) Poll or capitation taxes are direct taxes under the Constitution itself.

Article I, Section 9, Clause 4,
Scholey vs. Rew, 23 Wall. 331.

(b) Tax on slaves, which were personal property, in some states and realty in others.

1880 Springer vs. U. S. 102 U. S. 586.

(c) Tax on realty.

Idem.

(d) Tax on the income from realty.

(e) Tax on personalty.

(f) Tax on income from personalty.

1894 Pollock vs. Farmers Loan & Trust Co., 157 U. S. 429,
s.c. 158 U. S. 601.

(g) Tax on a stock dividend.

1920 Eisner vs. Macomber, 252 U. S. 189,
1918 Towne vs. Eisner, 245 U. S. 418.

In the case of the poll tax, the tax falls on the taxpayer by reason of his existence and is involuntary. In the other

cases the tax falls on the taxpayer by reason of the ownership of property and is likewise involuntary so long as the party continues to own the property, and as no one can exist without the ownership of property, these taxes also may be said to be involuntary.

INDIRECT TAXES.

(a) Tax on carriages for the conveyance of persons.
Hylton vs. U. S., 3 Dallas 171.

(b) Taxes on special privileges created by law.
Ins. Co. vs. Soule, 7 Wall. 433,
Venzie Bank vs. Fenno, 8 Wall. 533,
Nat'l Bank vs. U. S. 101 U. S. 1.

(c) Tax on the privilege of succeeding to the ownership of property abandoned by deceased persons.
Scholey vs. Rew, 23 Wall. 331,
Knowlton vs. Moore, 178 U. S. 41,
Trust Co. vs. Eisner, 256 U. S. 345.

(d) Tax on trade exchange sales.
Thomas vs. U. S., 192 U. S. 363.

(e) Tax on corporate franchises.
Flint vs. Stone-Tracy Co., 220 U. S. 107.

Such indirect taxes fall by reason of the voluntary exercise of the privilege.

(f) Taxes on tobacco, liquors, etc.
Patton vs. Brady, 184 U. S. 608.

(g) Taxes on foods.
McCray vs. U. S., 195 U. S. 27.

(h) Taxes on luxuries.
Billings vs. U. S., 232 U. S. 261.

All which were recognized "excises" or "duties" at the time of the adoption of the Constitution.

F.

Under the circumstances indicated *ante* D. E, the line between "direct" and "indirect" taxes, as those terms are used, must be found from the cases decided.

If we study those cases we find a principle common to all, and also common to the economic definitions.

1. A tax is "direct" when its incidence is determined by the existence of the taxpayer, the incidence of the tax is involuntary, or independent of the volition of the taxpayer, and unavoidable. In this class are poll taxes.

2. A tax is "direct" when imposed by reason of the ownership of property, and as no one can exist without ownership of property, this tax is also involuntary in its incidence and unavoidable. In this class are general taxes on property and the rights of ownership thereof.

3. A tax is "indirect" when its real incidence may be avoided by refusal or neglect to purchase the taxed article or to do the act or to exercise the privilege taxed, or where the original taxpayer indemnifies himself by collecting the tax from some other person whose assumption of the indemnifying payment is voluntary. In other words, liability to pay an indirect tax is created by the voluntary act of the taxpayer.

G.

The tax on gifts when levied retroactively—as in this case—falls within not only the economic definitions of "direct" taxes, but within the principles on which this Court has decided that taxes are or are not "direct".

(a) Economic definitions:

Smith's "Wealth of Nations" distinguishes between direct and indirect taxes in that direct taxes are assessed

on persons according to property or income, and indirect taxes on expenses of consumption. Smith's work was extant at the time of the adoption of the Constitution.

Turgot, the French author, whose work on taxation was published in 1764, says there are but three possible taxes—direct upon the funds, direct upon the person, and indirect, or that which is placed upon consumption.

Leroy Beaulieu in his treatise on the Science of Finance, defines direct taxes as those "which the legislature intends should be paid at once and immediately by him who bears their burden. They strike at once his fortune or his revenue and every intermediary between him and the treasury is suppressed."

McCullough in "Principles of Taxation" says a tax is direct when it is immediately taken from property, and indirect when it is taken from its owners by making them pay for liberty to use certain articles or exercise certain privileges.

D. A. Wells, in his "Theory and Practice of Taxation", says, page 341:

> "In a general sense the term 'direct' is applied to those taxes which are demanded from the particular persons who it is intended or desired shall pay them; and 'indirect' to those which are demanded from a person with the expectation and intention that he shall indemnify himself for payment of the same at the expense of some other person. There is, furthermore, marked distinction, founded on sound philosophy, between a direct and indirect tax, which, if concisely expressed, will constitute two unimpeachable definitions. Thus an indirect tax, whoever may first advance it, is paid voluntarily and primarily (in the sense of ultimately) by the consumer of the taxed article. On the other hand, a direct tax has always in it an element of compulsion; not necessarily on the person who ad-

vances the tax in block, but on the person who is compelled to use or consume the taxed property or its product. For example, there is nothing compulsory or unequal in an ordinary license tax. If the license is high, no one is compelled to engage in a business covered by its legal requirements; and few persons will until the average profits of the taxed business by the regular laws of competition finally reach the average profits of other like employments or investments. A tax on commodities like whiskey, tobacco, fermented liquors, oleomargarine, playing cards, dice and the like, can always be avoided as a primary tax, or can be paid at discretion. But there is nothing voluntary in the payment of a tax upon all real or personal property, or on the income of such property. Human beings cannot subsist without some forms of personal property, and therefore a tax upon all personal property or its income is of necessity compulsory and not voluntary. Any general assessments of personal property on or by reason of its income, as well as assessments on real estate, are unavoidable in their nature, and therefore, from a philosophic or economic point of view, are typically direct taxes."

In the light of these economic definitions of "direct" taxes, let us consider the tax levied in this case.

Prior to the enactment of the law, donor had a vested right to give away his property. Donee had a vested right to accept the gift. The gift was made. No law then existed which subjected the transaction to taxation. As a result donor parted with his property beyond recall. Donee received a vested title. Thereafter comes the "gift" tax, by which—

(1) Donor is made, by legislative fiat, personally liable for upwards of $52,000.

(2) All his remaining property is subjected to a first lien for that amount.

(3) All his remaining property is subjected to seizure and sale (distraint) to compel him to pay.

(4) All this without knowledge or voluntary action on his part and without possibility of his recovering the tax from donee. He must pay and can in no way avoid it.

(5) And under Treasury Regulation No. 67, Article 45, (quoted *ante* p. 15-16) the same consequences have fallen on the donees.

If this is not a "direct" tax, then there is no such thing. If the Congress may levy this tax, it may levy a like tax on every gift ever made back to the adoption of the Constitution and exact payment regardless of the "direct" tax provisions of the Constitution.

(b) This tax has all the earmarks of a "direct" tax within the tests held by the Supreme Court to be those of "direct" taxes.

Pollock vs. Farmers Loan & Trust Co., 157 U. S. 429, 558,
Pollock vs. Farmers Loan & Trust Co., 158 U. S. 627,
South Carolina vs. U. S., 39 C. Cl. 527,
South Carolina vs. U. S., affirmed, 199 U. S. 437,
Thomas vs. U. S., 192 U. S. 363,
Flint vs. Stone Tracy 220 U. S. 105, 151.

In *Pollock vs. Farmers Loan & Trust Company*, the opinion of the Court, page 558, says:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon someone else or *who are under no legal compulsion to pay them*, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or on the income yielded by such estates, and *the payment of which cannot be avoided*, are direct taxes. Nevertheless, it may be admitted that although this defini-

tion of direct taxes is prima facie correct and to be applied in the consideration of the question before us, yet, that the constitution may bear a different meaning and that such different meaning must be recognized." (italics ours)

In the opinion in the same case, on rehearing, page 627, the Court said:

"Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the constitution, taken in its plain and obvious sense and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and *with no possible means of escape from payment*, as belonging to a totally different class from that which includes the property from which the income proceeds? There can be but one answer, unless constitutional restriction is to be treated as utterly illusory and futile and the objects of its framers defeated. We find it impossible to hold that a fundamental requisition deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinction between that which gives value to the property and the property itself. (italics ours)

In *South Carolina vs. U. S.*, 39 *Court of Claims*, 257, it is said:

"A tax is obligatory; from it there is no escape. An excise is voluntary; the purchaser, who would pay it, cannot be compelled to purchase."

This case was affirmed. 199 U. S. 437.

Thomas vs. U. S. involved stamp tax on memoranda of sale of stocks sold on the New York Exchange. The Court said, page 371:

"The sale of stocks is a particular business trans-

action in the exercise of the privilege afforded by the laws in respect to corporations, of disposing of property in the form of certificates. The stamp tax is contingent on the happening of the event of sale, and *the element of absolute and unavoidable demand is lacking.* As such it falls, as stamp taxes ordinarily do, within the second class of forms of taxation." (italics ours)

In *Flint vs. Stone-Tracy Co.*, 220 U. S. 151, 152, the above quoted language from the Thomas case is cited and approved.

The element of choice or voluntary action by the taxpayer is totally lacking, so far as this case is concerned. The taxpayer had no choice. The tax comes within the definition of "direct" as laid down by the cases.

II.

A capitation or poll tax, is a tax upon the person without any reference to his property, business or employment.

9 C. J., p. 1281,
Hylton vs. U. S., 3 Dall. 171, 175,
Head Money Cases, 18 F. R. 135, 139,
Leedy vs. Bourbon, 12 Ind. 486,
Murchison vs. McNeill, 60 N. C. 217, 223,
Gardner vs. Hall, 61 N. C. 21, 22.

By the Constitution itself and by the decision of this Court, such a tax is a "direct" tax.

Const. Art. 1, Sec. 9, Clause 4,
Scholey vs. Rew, 23 Wall, 331.

Evidently such a tax is regarded as "direct" because it falls on the person of the taxpayer. It has no voluntary feature. No act of the taxpayer causes the incidence of the tax and no act of his can free him from it. Exactly the same is true of the retroactive tax in question. It falls on the person of the donor (taxpayer). The volition of the

donor has nothing to do with it, and he can in no way avoid payment.

If a capitation tax is a "direct" tax, any tax which operates in the same way and produces the same results on the person and property of the taxpayer must necessarily fall into the same class.

In this connection and as illustrating the "direct" character of this tax, attention is called to the fact that by the "Gift" tax sections of the Revenue law in question the tax falls directly on donor when the property given is beyond the territorial jurisdiction of the United States and the act of giving, i. e., the transfer itself, takes place outside of such territorial jurisdiction.

> "A tax • • • is hereby imposed upon the transfer by a resident by gift • • • of any property wherever situated, whether made directly or indirectly."
>
> Sec. 319, Revenue Act 1924.

Manifestly in such case the sole thing within the jurisdiction of the United States is the person of the resident donor, and the tax must fall directly on his person since the United States can exercise its power on nothing else. In such a case the tax falls because of residence and nothing else, and is exactly like a poll tax.

I.

As illustrating the "direct" character of this tax, attention is called to the apparent necessity of the tax being either "direct" or "indirect" in its entirety. It cannot be "direct" as to John Doe and "indirect" as to Richard Roe as far as it applies to "gifts" made after its enactment.

The tax is imposed "upon the transfer by a resident by gift • • • of any property wherever situated • • • and upon

the transfer by a non-resident by gift * * * of any property situated within the United States." Rev. Act. 1924, Sec. 319.

In the case of a resident who transfers property in Canada or any foreign country, manifestly the sole thing within the jurisdiction of the United States is the person of the taxpayer and the tax is "direct" upon that person. It can be nothing else, for there is nothing else the United States can tax.

In the case of a non-resident who transfers property within the United States, the sole thing within the jurisdiction of the United States is the property transferred and the tax is "direct" upon that property. It can be nothing else, for there is nothing else the United States can tax.

Can a tax which is manifestly "direct" as to one person be an "indirect" tax as to another?

J.

Taxes on realty and its income, and personalty and its income, are "direct" taxes.

1880 Springer vs. U. S. 102 U. S. 586,
1894 Pollock vs. Farmers L. & T. Co., 157 U. S. 429,
1894 Pollock vs. Farmers L. & T. Co., 158 U. S. 601,
1920 Eisner vs. Macomber, 252 U. S. 189

The Sixteenth Amendment permits "direct" income taxes to be levied without apportionment but makes no change as to other "direct" taxes.

1920 Eisner vs. Macomber, 252 U. S. 206

The "Gift" tax is not an "income" tax and cannot be sustained by the Sixteenth Amendment. If the "Gift" tax is "direct", it necessarily is void for want of apportionment.

We claim the "Gift" tax (retroactive as in this case) falls within the category of "direct" taxes, under the principles decided in the Pollock case and those which followed it.

Those cases held that taxing the income derived from personalty or realty was in reality taxing the property from which the income was derived. That in effect was saying that to tax the "use" by which "income" was derived from property, was to tax the property itself, since no "income" can be derived from property unless the property is "used".

Property value, in fact property itself, is not the mere right, independent of the incidents which go with it (possession, use and disposition). Mere possession is valueless, unaccompanied by the right of use and disposition, and the right of use without the right of disposition would in most cases render the property valueless. In fact, property itself has been defined as the right of possession, use and disposition.

Chicago vs. Englewood, 115 Ill., 375, 385,
Easton vs. Boston, 51 N. H. 504, 511,
Exp. Law, 15 F. C. 8126,
Dixon vs. People, 168 Ill. 179, 190,
Dixon vs. People, 39 L. R. A. 116,
See cases cited *ante*, p. 23-26.

If taxation of the incident of property known as "use" is a taxation of the property itself, and therefore a "direct" tax, can there be any distinction between taxing the "use" and the "disposition", both being "incidents" of property and both being necessary to give value to the property?

See Pollock vs. Trust Co., *ante*.

It has often been held that a tax on the transfer by sale of property was a tax on the property sold.

See *ante*, p. 19.

If a tax on transfer by sale is a tax on the property sold, why is not a tax on the transfer by gift a tax on the property given?

Regarded as taxation of the right of "use" or of the right of "disposition" the "Gift" tax is equally a tax on property, and therefore a direct tax and being unapportioned, is void.

K.

The "Gift" tax does not come within the recognized limits of any definition of an "indirect" tax.

It cannot be shifted from donor and ultimately paid by some one else, as the *economic* definition would require.

In this case the voluntary incurring of the tax, which under the Pollock case is a necessary element of an "indirect" tax is absent.

On the argument of *Pollock vs. Farmers Loan & Trust Company*, 157 *U. S.* 491, Mr. Justice Brown defined a distinction between direct and indirect taxes thus:

> "Direct taxes are paid by the taxpayer both immediately and ultimately, while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else."

Mr. Justice Field's definition in his concurring opinion, page 588, was:

> "Direct taxes in a general and large sense, may be described as taxes derived immediately from the person or from real or personal property without any recourse therefrom to other sources for reimbursement."

The definition given by Mr. Chief Justice Fuller in the opinion of the Court introduces the voluntary principle. Page 558, he said:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon someone else or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or on the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

It will be noted in the case at bar that both the possibility of shifting and the element of voluntary action on the part of the taxpayer causing the incidence of the tax are totally lacking.

In *Thomas vs. U. S.*, 192 *U. S.* 363, 370, the Court said with reference to indirect taxes, page 370:

> "There is no occasion to attempt to confine the words 'duties, imposts and excises' to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations, and the like. Taxes of this sort have repeatedly been sustained by this Court and distinguished from direct taxes under the Constitution."

Certainly a "gift" is not an "importation", a "consumption", a "manufacture or sale of commodities", a "vocation" or an "occupation". It cannot be a "privilege" to exercise the common vested right of disposition of owned property.

> Thompson vs. McLeod, 112 Miss. 383,
> Thompson vs. Kreutzer, Id. 165.

It certainly is not a "particular business transaction." It is not "business" at all. It is an isolated act of generosity. "Business" when subjected to taxation means business in the trade or commercial sense carried on for profit.

"The term 'business' as used in a law imposing a license tax on businesses, professions and callings, ordinarily means a business in the trade or commercial sense one carried on with a view to profit or livelihood."

1909 Cuzner vs. Cal. Club, 155 Cal. 303, 311,
1918 Reynolds vs. Lexington, 181 Ky. 503, 505,
1919 Texas Co. vs. Amos, 77 Fla. 327,
1910 Flint vs. Stone-Tracy Co., 220 U. S. 171.

"The employment or occupation in which a person is engaged to procure a living."

Goddard vs. Chafee, 2 Allen 395,
See *Webster's* Dict., Tit. Business,
1913 Shed vs. State, 155 S. W. 524,
1861 People vs. Commissioners, 23 N. Y. 242.

I.

The tax in question, no matter by what name it is called, is a tax upon one of the elements or incidents of the ownership of property. These elements are (1) possession, (2) use, (3) disposition, or we may say disposition is use. These are the rights which make property valuable. To tax these rights is to tax the property of which these rights are incidents.

That which gives property value is the right to employ and dispose of it. Deprive the owner of these rights and you have deprived him of the property itself.

1796 Hylton vs. U. S., 3 Dallas, 171.

1895 *Pollock vs. Trust Co.*, 157 *U. S.* 589. The concurring opinion of Mr. Justice Field in this case calls attention to the long line of cases holding that the right to the use of property is really the property itself.

In the case first cited, Mr. Justice Patterson, *arguendo*, says:

"Land independently of its produce is of no value." Page 177.

In *Pollock vs. Trust Co., on rehearing*, 158 *U. S.* 628, Mr. Chief Justice Fuller in delivering the opinion of the Court, said:

> "We find it impossible to hold that a fundamental requisition * * * can be refined away by forced distinctions between that which gives value to property and the property itself."

1887 *Powell vs. Pa.*, 127 *U. S.* 678, 684. The Court said, page 684:

> "The main proposition advanced by defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property is an essential part of his rights of liberty and property as guaranteed by the Fourteenth Amendment. The Court assents to this general proposition as embodying a sound principal of constitutional law."

1896 *Allgeyer vs. Louisiana*, 165 *U. S.* 578, 590, approved this.

1917 *Buchanan vs. Warley*, 245 *U. S.* 60. In this case the Court (in holding an ordinance prohibiting a negro from residing in any city block in which a majority of the houses were occupied by whites invalid) said, page 74:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property."

1856 *Wynehamer vs. The People*, 13 *N. Y.* 378, 396. The Court in defining property, said, page 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."

1888 *Kuhn vs. Detroit*, 70 *Mich.* 534, held "that property does not consist merely of the title and possession. It includes the right to make any legal use of it and the right * * * to sell and transfer it."

1874 *Grand Rapids Boom Co. vs. Jarvis*, 30 *Mich.* 320, 321.

Mr. Justice Christiancy, speaking for the Court, said:

> "Of what does property practically consist but of the incidents which the law has recognized as attached to the title or right of property? Is not the idea of property in or title to the lands, apart from and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of'? Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction than of the incidents of property, which alone render it practically valuable to him? Among the incidents of property in land, or anything else, is not the right to enjoy its beneficial use and so far control it as to exclude others from that use, the most beneficial, the one most real and practical idea of property, of which it is a much greater wrong to deprive a man than of the mere abstract idea of property without incidents? This use or the right to control it with reference to its use constitutes in fact all that is beneficial in ownership except the right to dispose of it, and this latter right or incident would be rendered barren and worthless stripped of the right to the use. Property does not consist merely of the right to the ultimate particles of matter of which it may be composed * * * but of those properties of matter which can be rendered manifest to our senses and made to contribute to our wants or our enjoyment."

If property includes the right of disposition as this Court says it does, it must follow that a tax on the right of disposition is a tax on the property disposed of.

THIRD.

The tax in question, so far as it affects the plaintiff in this case, has deprived him of property without compensation and without due process of law contrary to the Fifth Amendment.

A.

It is to be remembered that so far as plaintiff is concerned, this total tax is retroactive. The total amount of the gifts, over and above the statutory exemption, was donated prior to the enactment of the Gift Tax Law (R. 1). At the time when these gifts were made the donor had no knowledge that any such tax law would be enacted. He had a vested right secured to him by the Constitution of the United States to give away his property without incurring any such liability for so doing. The donee had a vested right to acquire the donated property, without this liability. After the acts in question had taken place, the Congress by a retroactive tax law imposed a personal liability for a large sum of money which did not exist at the time of the transactions in question. It also fastened upon the remaining property of the donor, on the donated property, and on the property of the donee, a lien for the amount of the tax, and subjected the property of donor and donee to summary process of distraint. This the Congress did by legislative fiat without the possibility of the donor or donee having any hearing or election in the premises.

The Congress has in effect, *taxed an isolated act committed before the taxing act was enacted.*

B.

For plaintiff-in-error it is claimed:

1. That the tax in question being levied on a gift of

State securities, was beyond the taxing jurisdiction of the Congress, and hence was not due process.

2. That the tax being direct and unapportioned, was beyond the jurisdiction of the taxing power of the Congress, and hence was not due process.

3. That by reason of its being levied on a single act which occurred prior to the enactment of the tax law, this tax in this case amounts to a judgment by the Congress pronounced without notice or hearing and hence is not due process.

C.

It is not claimed that the Fifth Amendment is a limitation on the taxing power of the Congress. It is, however, claimed that it forbids the Congress from acting without jurisdiction or arbitrarily.

It has been held that the Fifth and Tenth Amendments qualify as far as applicable all the provisions of the Constitution but do not take away the grant of power to tax;

1903 McCray vs. U. S., 195 U. S. 27, 61,

and

1924 *Barclay vs. Edwards*, 267 U. S. 442, 450—the last decision on the subject of the applicability of the Fifth Amendment to the United States tax laws—states the rule thus:

> "The power of Congress in levying taxes is very wide and where a classification of taxpayers is reasonable and not merely arbitrary and capricious, the Fifth Amendment cannot apply." (p. 450)

1926 Schlesinger vs. Wis., 270 U. S. 230.

See also

1917 Hammer vs. Dagenhart, 247 U. S. 251,
1921 Child Labor Case, 259 Id. 20,
1921 Hill vs. Wallace, 259 Id. 44.

Taking the cases together, the rule as to the applicability of the Fifth Amendment to questions of taxation appears to be:

1. It limits capricious and unreasonable classifications for purposes of taxation.

2. If the Congress has power to levy a tax and does so, the method used is "due process" and the tax is not a "taking without compensation."

3. As a corollary, it follows that if the Congress has not the power to levy a given tax, then its doing so is not "due process", etc.

D.

It is claimed by defendant-in-error that the Congress has unlimited power to levy taxes retroactively. If that contention is correct the Congress has power to levy taxes on every gift ever made back to the beginning of government under the Constitution.

The cases cited in support of this contention when the *dicta* therein are limited to the facts under consideration fail to support the contention. No case decided in this Court has gone so far. The rulings in—

1873. Stockdale vs. Ins. Co., 20 Wall. 323,
1910. Flint vs. Stone Tracy Co., 220 U. S. 111,
1915. Brushaber vs. U. P. R. R., 240 U. S. 1,

amount to no more than this: that Congress may levy an income tax to be payable after the enactment of the tax law, the amount of such tax to be measured by the amount of income previously received by the taxpayer.

1901. Patton vs. Brady, 184 U. S. 608,

simply holds that the Congress may levy a new or increased excise on goods which have once paid an excise, before such goods have passed into the hands of the consumer.

1913 *Billings vs. U. S.*, 232 *U. S.* 261, was this. The Act of August 5, 1909, imposed a tax of $7.00 per ton "upon the use of every foreign built yacht, pleasure boat or vessel not used or intended to be used for trade now or hereafter owned or chartered for more than six months by any citizen" of the United States.

Defendant admitted that he being a citizen of the United States had owned and used such a yacht in foreign waters during the year prior to September 1, 1909. This use was in part, viz.: August 6, 1909, to September 1, 1909, while the statute was in force. The vessel had been owned for more than six months and had been used after the act was passed. The act was not based on the extent of the use, but merely on the "use". Manifestly the owner was within the express terms of the act and the Court so held, page 282.

There was no retroactivity.

1921 *Schwab vs. Doyle*, 258 *U. S.* 529, involves no decision as to the legality of retroactive laws. The law in that case was held not to be retroactive.

1923 *Hecht vs. Malley*, 265 *U. S.* 144, 163, 164, was this: Two Massachusetts trusts were assessed for capital stock taxes under the Revenue Act of 1916 for the year ending June 30, 1919, and paid the same. Subsequently they were assessed an additional tax for the same year under the Revenue Act of 1918, approved February 24, 1919, which made the total tax equal to that for which they would have been assessed had the assessment been made under the 1918 act. In a suit to recover the taxes so paid, the Court held that the trusts were not liable under the 1916 act, but

as they were liable under the 1918 act, for more than the tax paid, no tax could be recovered.

In this case the measure of the tax was the previously existing capital of the corporation, not an isolated act previously done.

E.

The "Gift" tax is capricious and unreasonable in that—

1. In this case, the tax is retroactive in its entirety.

2. It infringes rights vested long before the enactment of the taxing act.

3. It taxes rights of ownership which by no stretch of imagination can be distinguished from rights of ownership admittedly beyond the taxing power of Congress.

Donor had in the securities given certain rights of ownership, which "rights" were and are "property," viz.:

(a) He could keep them, without collecting interest or principal;

(b) He could keep them, and collect principal and interest when due;

(c) He could destroy them;

(d) He could sell them for adequate consideration; and

in none of the four cases could the Congress, within the decisions, have the power to tax.

On the other hand, it is claimed for the Congress that it has power to tax, two other rights of ownership, which "rights" are equally with the previous four "property", viz.:

(e) The sale—if made for an inadequate consideration; Gift Law, Sec. 320.

(f) The gift.

By what logic such a classification can be sustained we are unable to see. Sales for adequate or inadequate consideration are equally transfers of title, and equally the exercise of the right of ownership. As noted, *ante* page 19, a tax on a transfer by sale is a tax on the property transferred. Is it any less such a tax because the consideration for the transfer is inadequate in "money or money's worth"?

Sales and Gifts are equally transfers of title. A tax on a Sale and a tax on a Gift alike fall, as noted, after the seller or donor has parted with title to the thing given. No difference in principle can be urged as existing between these two forms of transfer. The learned judge below says, a sale has a consideration and a gift has none. The learned judge has overlooked the fact that donors do not make gifts without some consideration which they deem adequate.

In the final analysis, therefore, this Gift Tax act asserts the right of the United States to decide what considerations shall attend all transfers of property by sale or by gift, and substitutes for the judgment of the parties to the transaction the judgment of the officials of the United States, as to what consideration shall attend every sale and every gift.

By so doing property rights are infringed, due process is denied, and property is taken without compensation.

This intent appears on the face of the Gift Tax act and brings it within the principle of the Child Labor Cases cited *ante* p. 51 and treats "a prohibition which is general as if it were confined to a particular mode of doing the particular thing."

Brown vs. Maryland, 12 Wheat. 444.

Such classification has no reasonable foundation.

1926 Schlesinger vs. Wis., Adv. Op. Mar. 15, 1926, 301.

As illustrating the arbitrary and fantastic classification of taxpayers made by this Act, attention is called to the following facts.

1. The tax falls on a resident alien or citizen who donates property outside of the United States.

A non-resident alien or citizen is free of such tax.

2. It falls on non-resident alien's or citizen's property within the United States if donated.

The non-resident alien or citizen may remove personalty from the United States, donate it, and be free of tax.

3. Citizenship in the United States is not the basis of the tax.

Residence or non-residence is.

4. John Doe may give a million in $500.00 gifts and is free of tax.

5. Richard Roe giving a like amount in gifts of more than $500.00 each is taxed enormously.

6. These classifications (4) and (5) are not based on amounts given but on the manner in which the gifts are distributed.

7. A resident citizen has an exemption of $50,000.00.

8. A non resident citizen has no exemption.

This lacks the basis of classification laid down by this Court in—

1898. Magoun vs. Ill. T. & S. Bk., 170 U. S. 283,
1897. G. C. & S. F. Ry. vs. Ellis, 165 U. S. 150,
1910. S. Ry. Co. vs. Greene, 216 U. S. 400.

FOURTH.

The attention of Court is called to the decisions in—

McNeir vs. Anderson,

decided by A. N. Hand, D. J., in the Southern District of New York, reported in 10 Fed. Repr. (2nd) 813, holding the gift tax unconstitutional, and the same case reversed by the Second Circuit Court of Appeals in—

Anderson vs. McNeir,

decided January 10, 1927.

LeFeber vs. Wilkinson, and
Nunnemacher vs. Wilkinson,

decided by Geiger, D. J., in the Eastern District of Wisconsin.

None of these cases involve the question of the gift tax as applied to a gift of state securities. All involved the question of retroactivity. Hand, D. J., held the gift tax levied to be a direct tax because unapportioned. Geiger, D. J., (whose decision is printed as Appendix B) holds the tax "direct" because its retroactivity removes the voluntary feature which accompanies an "excise".

The McNeir case was reversed by the Second Circuit Court of Appeals, that Court holding that the tax was an excise upon *one* of the rights of property which fell short of taxing *all* the rights of ownership, and therefore was not a property tax. This apparently on the authority of the Billings case.

It is submitted that if such rule is correct the Congress may indirectly tax property while directly it may not do so.

If the ruling be correct, then the Congress may levy so-called "excise" taxes separately upon every possible use of

property and thereby tax the entire property without apportionment.

This is treating "a prohibition which is general as if it were confined to a particular mode of doing the particular thing,"

Brown vs. Maryland, 12 Wheat. 444,

and is transgressing the principle that what cannot be done directly cannot be done indirectly, so many times affirmed by this Court.

FIFTH.

In conclusion it is respectfully submitted that:

1. This tax is invalid, because being levied on a gift of State securities, it is beyond the taxing jurisdiction of the Congress.

2. It is invalid, because being levied without apportionment it is beyond the taxing jurisdiction of the Congress.

3. Being beyond the taxing jurisdiction of the Congress, it transgresses the Fifth and Tenth Amendments.

4. It is so capricious, arbitrary and illogical in its classification as to make it manifest that it lacks uniformity, and was on its face primarily intended to prevent gifts and not to raise revenue, and therefore contrary to the Fifth Amendment.

5. It impairs vested rights, by reason of its retroactivity, and therefore transgresses the Fifth Amendment.

It should be certified that this tax in this case is invalid.

MARK NORRIS,

Counsel for Plaintiff-in-Error.

APPENDIX A.

SEC. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: (rates follow).

SEC. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

SEC. 321. In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

(a) In the case of a resident—

(1) An exemption of $50,000;

(2) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or

fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(3) Gifts the aggregate amount of which to any one person does not exceed $500;

(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (a) as having been received by the donor within five years prior to the time of his making such gift, either from another person by gift or from a decedent by gift, bequest, devise, or inheritance, or (b) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior Act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

(b) In the case of a nonresident—

(1) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any political subdivision

thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any domestic corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used within the United States by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(2) Gifts the aggregate amount of which to any one person does not exceed $500;

(3) An amount equal to the value of any property situated in the United States transferred by gift within the calendar year, which can be identified (a) as having been received by the donor within five years prior to the time of his making such gift, either from another person by gift or from a decedent by gift, bequest, devise, or inheritance, or (b) as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax or an estate tax under this or any prior Act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross

estate of such decedent, and only to the extent that the value of such property is included within the total amount of gifts made within the calendar year of property situated in the United States and not deducted under paragraph (1) or (2) of this subdivision.

SEC. 322. In case a tax has been imposed under section 319 upon any gift, and thereafter upon the death of the donor the amount thereof is required by any provision of Part I of this title to be included in the gross estate of the decedent then there shall be credited against and applied in reduction of the estate tax, which would otherwise be chargeable against the estate of the decedent under the provisions of section 301, an amount equal to the tax paid with respect to such gift; and in the event the donor has in any year paid the tax imposed by section 319 with respect to a gift or gifts which upon the death of the donor must be included in his gross estate and a gift or gifts not required to be so included, then the amount of the tax which shall be deemed to have been paid with respect to the gift or gifts required to be so included shall be that proportion of the entire tax paid on account of all such gifts which the amount of the gift or gifts required to be so included bears to the total amount of gifts in that year.

SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and

that of the consideration received by him, both as of the date of such sale or exchange.

SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, insofar as applicable, to the same provisions of law as the tax imposed by section 301.

APPENDIX B.

UNITED STATES DISTRICT COURT	EASTERN DISTRICT OF WISCONSIN
John LeFeber, Plaintiff, vs. A. H. Wilkinson, Defendant.	Emily Nunnemacher, Plaintiff, vs. A. H. Wilkinson, Defendant.

DECISION.

THE COURT: I think Mr. Glickman is right in saying that the whole proposition comes down to the single direct statement: Can an excise tax be effective other that *in future?*

The case comes here really with the necessity, as I might say, of deciding the case definitely. The proposition that is presented here rests ultimately upon the definitive inclusion or exclusion of elements and ingredients in what is called an 'excise'; I mean, the so called burden which we term an excise; and it would seem to me that the implication is that as between the Government and the subject who is expected to be reached by the law, either in respect of his property, or, as we might say, of his conduct, of his movements, that will be open to choice; the implication in an excise not theretofore existing or not theretofore exacted, to the subject is: 'If you want to do this particular thing you can do it with the burden attaching to you, which we will now impose on you.'

Then, in the case of a gift, as in the case of certain other taxes that are not direct taxes, the subject can take his choice. If he wants to do it he must submit to the burden which the law imposes upon the doing of

the act; but, when it appears that the act has been fully completed prior to the passage of the law, why of course the burden is imposed without the choice of relief by concluding not to exercise the privilege.

Now, when that is so, the question is particularly asked. Here are the gifts made in February and May, 1924, prior to the passage of this act. It seems absurd to say that the Nunnemacher and LeFeber donors should be told on June 2, 1924, that they are now subjected to an excise upon an act wholly beyond their power to revoke, recall, or do a thing in respect of what they had previously done; and how then can you escape the idea, although it is called an excise, that it is nothing more or less than a direct tax, either against their property or against them, in respect of a completed transaction, which, if I might put it that way, at the time Congress passed the law was no longer, as to them, *excisable?*

I am impressed with the fundamental character of that question; that the plaintiffs can well urge it at the threshold of these cases; and being decided favorably to them dispenses with the necessity of considering or, much less, determining the validity of the law outside of that, and the plaintiffs may take a judgment in each of the cases.

FILED
SEP 13 1937
CHARLES ELMORE CROPLEY
CLERK

UNITED STATES OF AMERICA

The Supreme Court

JOHN W. BLODGETT,
Plaintiff-in-Error,
vs.
CHARLES HOLDEN,
U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

OCTOBER TERM 1937
No. 154.

On certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

Supplemental Brief for Plaintiff-in-Error

MARX NORRIS, Counsel.

II.

The Revenue Act of 1926, amended Sec. 319 of 1924,

See: 44 Stat. part 2, page 86, Sec. 324.

and provided that as amended it should go into effect

June 2, 1924.

44 Stat. Pt. 2, page 87, Sec. 324 (b)

10/4/27

Mark Norris,

Counsel for John W. Blodgett.

No. 154.

October Term, 1927.

Blodgett,

vs.

Holden.

I.

The Gift Tax Act of 1924 is found 43 Stat. p. 313. Sec. 319 et seq.

and went into effect

"Except as otherwise provided this act shall take

INDEX

Reason for supplemental brief ..... p. 1

Gift Tax Act intended to be, and by its terms is, retroactive ..... I, p. 2

Plaintiff in error's gift made prior to law .. I, p. 2

Tax is "direct" and "unapportioned" ..... II, p. 3

Tax is violation of Fifth amendment ..... II, p. 3

Authorities supporting last two propositions and argument thereon ..... III, IV, p. 3

Conclusion ..... VI, p. 6

CASES CITED.

Billings vs. U. S., 232 U. S. 261 ..... p. 5

Brushaber vs. U. S., 240 U. S. 1 ..... p. 5

Flint vs. Stone-Tracy Co., 220 U. S. 111 ..... p. 5

Levy vs. Wardell, 258 U. S. 542 ..... p. 3, 4

Nichols vs. Coolidge, Adv. Op. 6 15 27, 797 .. p. 1, 3

Patton vs. Brady, 184 U. S. 608 ..... p. 5

Schwab vs. Doyle, 258 U. S. 529 ..... p. 3

Stockdale vs. Ins. Co., 20 Wall. 323 ..... p. 5

U. S. Stat. Gift Tax., 43 Stat. 253, 313 ..... p. 2, 6

U. S. Act. Feb. 24, 1919, 40 Stat. 1057, 1096 .... p. 4

UNITED STATES OF AMERICA

The Supreme Court

JOHN W. BLODGETT,
Plaintiff-in-Error,
vs.
CHARLES HOLDEN,
U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

OCTOBER TERM 1927
No. 154.

OCTOBER TERM 1926
No. 779.

Supplemental Brief for Plaintiff-in-Error

Since the filing of the original brief for plaintiff-in-error this Court has decided *1927, Nichols vs. Coolidge, Adv. Op. June 15, 1927, p. 797*, decided May 31, 1927.

The fact that that case, in the judgment of counsel for plaintiff in error, is decisive of one of the questions in this case, viz: the invalidity of the Gift Tax Act as applied to the facts herein, leads counsel to submit this supplemental brief.

I.

The Gift Tax Act by its terms applies to all gifts made during the calendar year 1924. Section 319 of the act provides:

> "For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated whether made directly or indirectly." • • •
>
> U. S. Rev. Act 1924, approved June 2, 1924 (43 Stat. 253, 313) Appendix A — Original Brief.

As the law was not enacted until June 2, 1924, it is manifest that as to gifts made between January 1, 1924, and June 2, 1924, the tax is retroactive, i. e., imposed on transfers not taxable when made.

The gifts made by plaintiff-in-error, so far as taxable under the act, were made prior to the enactment of the law.

R. 1, 2; Original Brief pp. 2, 3.

II.

Independent of the fact that plaintiff-in-error's gifts, so far as claimed to be taxable, consisted of state and municipal bonds, it is claimed for plaintiff-in-error, that the gift tax act is unconstitutional, in this:

1. That when applied, as here, retroactively, the tax is direct and unapportioned; and

2. A violation of the due process clause of the Fifth Amendment.

III.

The late decisions of this Court sustain our contention.

1921 Levy vs. Wardell, 258 U. S. 542, 544.
1927 Nichols vs. Coolidge, Adv. Op. June 15, 1927, p. 797, decided May 31, 1927.

In *Levy vs. Wardell*, a retroactive application of the Estate Tax Act of September 8, 1916, was sought on behalf of the United States. The transfers there sought to be taxed were (1) gifts *inter vivos* (2) made prior to the enactment of the act (3) not in contemplation of death and (4) were absolute except that donees agreed to pay donor the dividends on the donated stocks during donor's life. (p. 543, 544).

This Court, following its decision in
Schwab vs. Doyle, 258 U. S. 529,
held the act of September 8, 1916, not to be retroactive.

The facts in *Schwab vs. Doyle* differed from those in *Levy vs. Wardell* in this: that in Schwab vs. Doyle the transfer was "in contemplation of death" (p. 534) while in Levy vs. Wardell transfer was "not in contemplation of death" (p. 544).

The reasons given for the decision in Levy vs. Wardell are, therefore, different from those given in Schwab vs. Doyle, and are pertinent and applicable to the case at bar. Those reasons are thus stated: (pp. 544, 545).

> "At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United State to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment, and would not be, besides, a transfer tax or an indirect tax but would be a direct tax thereon in violation of Article I, Section 9, subdivision 4 of the Constitution of the United States, because not laid in proper relation to census or enumeration as therein provided."

In *Levy vs. Wardell* it may fairly be said there was some doubt as to whether the Congress intended the Act of September 8, 1916, to apply to past transactions.

In the case of *Nichols vs. Coolidge*, however, there can be no such doubt. The Act of February 24, 1919 (40 Stat. 1057, 1096) distinctly applied the tax to past transfers. This Court there held such application to be unconstitutional when applied to absolute transfers, not made in contemplation of death, and made prior to the enactment of the Act of February 24, 1919.

IV.

The fact in the case at bar and those in *Levy vs. Wardell* and *Nichols vs. Coolidge* when compared show identity in every particular.

	Levy vs. *Wardell*	*Nichols* vs. *Coolidge*	*Blodgett* vs. *Holden*
1.	Transfer was a gift *inter vivos*	Same	Same
2.	Not in contemplation of death	Same	Same
3.	Made prior to tax law	Same	Same
4.	Was absolute	Same	Same

V.

In the light of these decisions, it is unnecessary further to discuss the cases relied on by the government in the Courts below, such as

1873 Stockdale vs. Ins. Co., 20 Wall. 323

1910 Flint vs. Stone-Tracy Co., 220 U. S. 111

1915 Brushaber vs. U. P. R. R. Co., 240 U. S. 1

1910 Patton vs. Brady, 184 U. S. 608

1913 Billings vs. U. S., 232 U. S. 261

These are discussed in our original brief (pp. 51-53) and so far as inconsistent with *Levy* v. *Wardell* and *Nichols* v. *Coolidge* must be regarded as overruled, so far as gifts *inter vivos* under similar circumstances are concerned.

VI.

It is asked that it be certified to the Court of Appeals for the Sixth Circuit that the Gift Tax Act as applied to the transfer in question is unconstitutional and void because

1. The property transferred was not within the taxing jurisdiction of the United States.

2. The tax is a direct tax not apportioned according to the population.

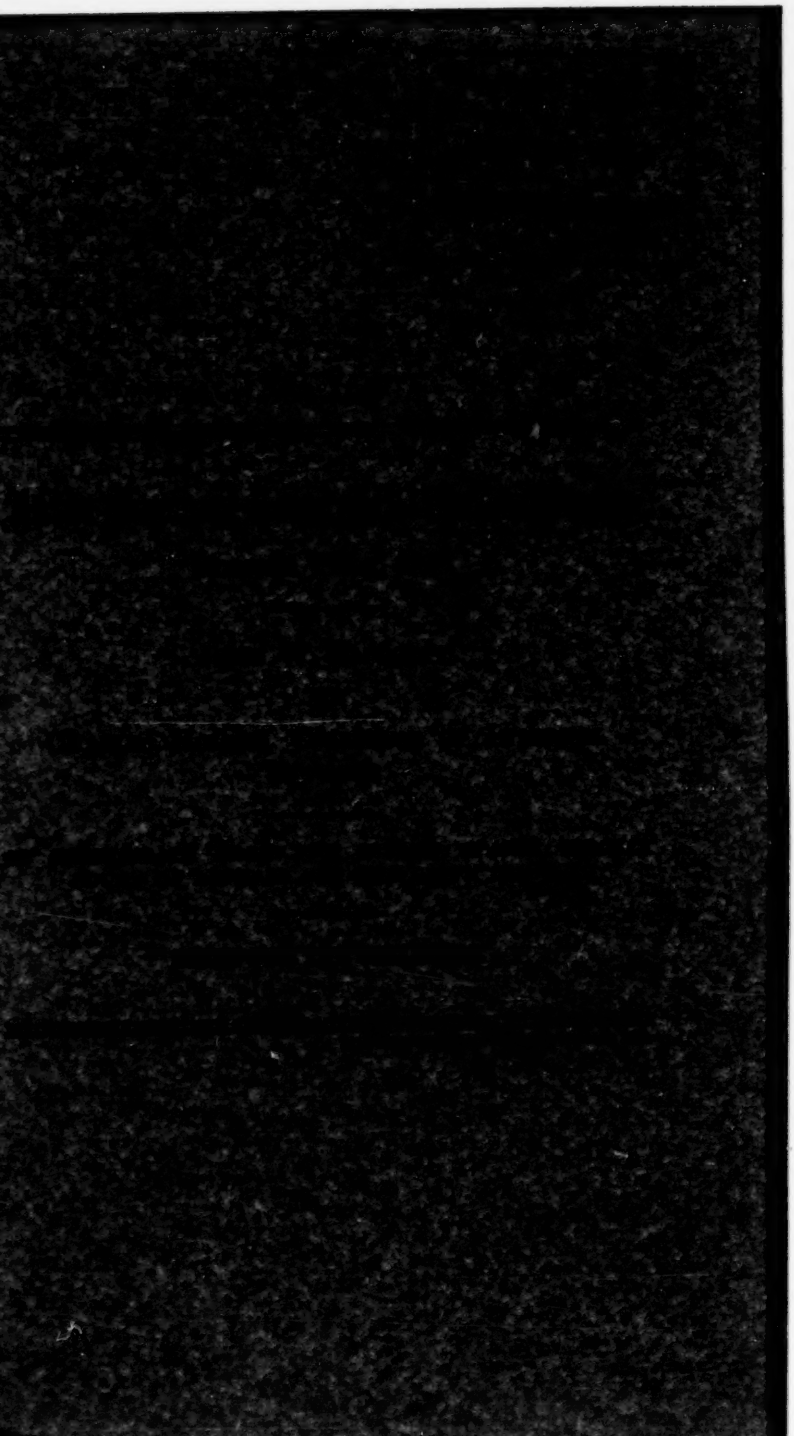
3. The tax, when applied retroactively, is a direct and unapportioned tax.

4. The Congress lacks power to tax absolute, isolated, transfers, not made in contemplation of death, and occurring prior to the enactment of the tax law.

Respectfully submitted.

MARK NORRIS,

Counsel for Plaintiff in Error.



INDEX

	Page
Opinion below	1
Jurisdiction	1
Statement	1
The question certified	3
The statute involved	4
Summary of argument	4
Argument	
I. The tax upon transfers of property by gift is not a direct tax but an excise	4
II. The tax law is not unconstitutional as applied to transfers of property by gift during the earlier portion of the year in which the law was passed	11
III. A tax upon the transfer by gift of State and municipal bonds is not a tax upon those bonds and may be imposed by Congress without unconstitutionally interfering with the operations of the governments issuing such bonds	22
Conclusion	24
Appendix. Secs. 319 to 324 of the Revenue Act of 1924	26

CITATIONS

Cases:

Anderson v. *McNair*, 16 F. (2d) 970	15
Billings v. *United States*, 232 U. S. 261	8, 10, 13
Bowman v. *Continental Oil Co.*, 256 U. S. 642	8
Brown v. *Maryland*, 12 Wheat. 419	9
Brushaber v. *Union Pacific Railroad Co.*, 240 U. S. 1	9, 14
Calder v. *Bull*, 3 Dall. 386	12
Carpenter v. *Pennsylvania*, 17 How. 456	12
Curtis v. *Whitney*, 13 Wall. 68	12
Doyle v. *Mitchell Brothers Co.*, 247 U. S. 179	8
Flint v. *Stone Tracy Co.*, 220 U. S. 107	6, 8, 9
Greiner v. *Lewellyn*, 258 U. S. 384	22
Hecht v. *Malley*, 265 U. S. 144	14
Hylton v. *United States*, 3 Dall. 171	8, 10
Johannessen v. *United States*, 225 U. S. 227	12
Kentucky Union Co. v. *Kentucky*, 219 U. S. 140	12
Knowlton v. *Moore*, 178 U. S. 41	5, 7
Locke v. *New Orleans*, 4 Wall. 172	12
McCray v. *United States*, 195 U. S. 27	8
Metcalf & Eddy v. *Mitchell*, 269 U. S. 514	24
New York Trust Co. v. *Eisner*, 256 U. S. 345	6, 7, 9

Cases—Continued. Page

Nicol v. *Ames*, 173 U. S. 509 ..... 8, 9, 10
Nichols v. *Coolidge*, No. 88, Oct. Term, 1926; decided May 31, 1927 21
Pacific Insurance Co. v. *Soule*, 7 Wall. 433 8
Patton v. *Brady*, 184 U. S. 608 8
Peggy, The, 1 Cranch, 103 12
Plummer v. *Coler*, 178 U. S. 115 23
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 7
Prize Cases, 2 Black, 635 12
Railroad Co. v. *Collector*, 100 U. S. 595 14
Railroad Co. v. *Rose*, 95 U. S. 78 13
Satterlee v. *Matthewson*, 2 Pet. 380 12
Scholey v. *Rew*, 23 Wall. 331 7
Seattle v. *Kelleher*, 195 U. S. 351 12
Snyder v. *Bettman*, 190 U. S. 249 7
Spreckels Sugar Refining Co. v. *McClain*, 192 U. S. 397 8
State v. *Bell*, 61 S. C. 76 12
Stockdale v. *Insurance Companies*, 20 Wall. 323 ..... 12, 14
Stratton's Independence v. *Howbert*, 231 U. S. 399 8
Thomas v. *United States*, 192 U. S. 363 ..... 8, 9, 10
Veazie Bank v. *Fenno*, 8 Wall. 533 8

Statutes:

Constitution, Art. I, sec. 2, cl. 3, sec. 9, cl. 4 3
Act of July 13, 1866, c. 184, 14 Stat. 98, 139 14
Act of July 14, 1870, c. 255, 16 Stat. 256, 261 12
Act of August 5, 1909, c. 6, 36 Stat. 11, 12 13
Act of October 3, 1913, c. 16, 38 Stat. 114, 166 14
Act of February 24, 1919, c. 18, 40 Stat. 1057, 1126 14
Act of June 2, 1924, c. 234, secs. 319-324, 43 Stat. 253, 313; U. S. C., Title 26, secs. 1131-1136 2

Congressional Record, vol. 65:

Pt. 3, p. 3119 15
p. 3120 15
p. 3122 15
Pt. 4, p. 3170 16
p. 3172 15
p. 3173 15
p. 3177 20
Pt. 8, p. 8004 17
p. 8005 ..... 15, 17
p. 8006 17
p. 8007 20
Pt. 9, p. 9421 20
p. 9530 20
p. 9536 20
p. 9537 20
p. 9547 20

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 154

JOHN W. BLODGETT

v.

CHARLES HOLDEN, COLLECTOR OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE COLLECTOR

OPINION BELOW

The opinion of the District Court is reported in 11 F. (2d) 180. The certificate of the Circuit Court of Appeals is unreported.

JURISDICTION

The case is here on certificate under Section 239 of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

The certificate sets forth the facts, which were undisputed. Inadvertently it misstates the date of approval of the Act of Congress which is involved.

A taxpayer brought action to recover taxes paid upon transfers by gift, levied and exacted under Sections 319 to 324 of the Revenue Act of 1924 (approved June 2, 1924, c. 234, 43 Stat. 253, 313; U. S. C., Title 26, Secs. 1131–1136). Upon a motion in the nature of a general demurrer, the District Court held that no cause of action was stated and rendered judgment for the defendant.

During the calendar year 1924 the taxpayer made gifts to the value of more than $872,000. Exclusive of gifts for charitable and other exempt purposes, his gifts aggregated $843,686 prior to the date on which the Revenue Act of 1924 became effective. Of this amount $818,086.02 consisted of bonds issued by States or political subdivisions thereof. He also made gifts aggregating $6,500.02 between that date and the end of the year. By the Revenue Act a specific exemption of $50,000 is allowed. The net amount of his transfers by gift during that year which were taxed was, therefore, the sum of $800,186.02, on which he paid a tax of $52,023.52 under protest.

These transfers by gift were all inter vivos, and the Government did not contend that they were made in contemplation of death.

The District Court held that the tax was properly levied and collected and that the Revenue Act was in no respect invalid. The Circuit Court of Appeals held that the Revenue Act intended to subject these gifts to the tax so levied and paid and that the taxpayer was not entitled to recover any

part of the taxes so paid if the taxes imposed were not in conflict with the Constitution. The appellate court, however, requested instructions upon the following questions:

THE QUESTIONS CERTIFIED

(1) Are the said provisions of Sections 319 to 324 of the Revenue Act of 1924 unconstitutional as applied to transfers of property by gift, under the circumstances above stated, because the tax so imposed is a direct tax and has not been apportioned, as is required by Clause 3, Section 2, and Clause 4, Section 9 of Article I of the Constitution?

(2) Are said provisions unconstitutional in so far as they impose and levy a tax upon transfers of property by gifts inter vivos, not made in contemplation of death, and made prior to the enactment of said Revenue Act of 1924, either because the same is a direct tax and unapportioned, or because it is a taking of the property of the donor or donee without due process of law, or for public use without just compensation, in violation of the Fifth Amendment to the Constitution?

(3) Are said provisions of said Revenue Act unconstitutional and void as applied to transfers of property by gift, under the circumstances above stated, in so far as it imposes said tax upon transfers of property consisting of bonds and other securities issued by a State or some political subdivision thereof for public uses?

THE STATUTE INVOLVED

The pertinent parts of the Revenue Act of 1924 are set forth in an appendix to this brief (pp. 26–29).

SUMMARY OF ARGUMENT

1. While general property taxes are direct taxes, taxes upon transfers of property are excises. Whether this distinction is or is not entirely logical, it has been thoroughly established by the decisions of this Court.

2. The only retroactive laws which the Constitution forbids Congress to enact are those which are ex post facto. Congress has power to enact retroactive tax laws. No facts are stated which cause the statute here involved to appear arbitrary and unreasonable as applied to the complaining taxpayer.

3. While Congress may not tax State and municipal securities, it may tax transfers of property by gift and include therein transfers of tax-exempt property.

ARGUMENT

I

THE TAX UPON TRANSFERS OF PROPERTY BY GIFT IS NOT A DIRECT TAX BUT AN EXCISE

Direct taxes are, besides capitation taxes, taxes which are levied on persons solely because of their general ownership of property and taxes which are the legal equivalent of such property taxes. This Court went thus far in the Income Tax Cases, but

it refused to give any broader meaning to the term. Every other tax is indirect, regardless of the question whether it may be shifted from the person on whom it is first cast by law and regardless of the question whether it may be avoided. Apparently the only legal equivalent of a tax on the general ownership of property is a tax on the income from such property.

In *Knowlton* v. *Moore*, 178 U. S. 41, the Court pointed out that its decision in the Income Tax Cases did not furnish any basis for a rule broader than that set forth above, saying (p. 82):

> It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or

> personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall.

And in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349, it was held that there was no force in the contention that as a tax upon the transfer of the net assets of a decedent's estate could not be avoided the tax was therefore a direct one.

As indicated by the quotation from the opinion in *Knowlton* v. *Moore*, *supra*, direct taxes are only those which are essentially equivalent to taxes on property generally, real or personal, solely because of its ownership. The same terms were used in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 150, in deciding that a tax upon the privilege of doing business in a corporate capacity was not a direct tax. The Court based this conclusion upon the ground that the tax was not "upon property solely because of its ownership."

A tax upon the transfer of property by gift is not equivalent to a tax upon property because of

its ownership. It is, rather, on the same basis as a tax on the transfer of an estate at death or one on the transfer of property by sale, or similar taxes. All such taxes have been sustained as excises.

Thus in *Scholey* v. *Rew*, 23 Wall. 331, it was held that a tax upon the succession to real estate upon the death of another was not a tax upon land but a duty or excise. This decision was not questioned in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 577. It was followed in *Knowlton* v. *Moore*, 178 U. S. 41, where a tax upon the receiving of legacies was sustained as an indirect tax. In *Snyder* v. *Bettman*, 190 U. S. 249, a succession tax was enforced in the case of a transmission of property by legacy to a municipality, upon the ground that the tax was not upon the property but upon the right to succeed to the property (p. 254). And in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, the case of *Knowlton* v. *Moore* was cited as disposing of the contention that a tax upon the transfer of the net estate of every decedent, to be paid by the executor, was a direct tax, the Court saying that such a tax has always been regarded as the antithesis of a direct one (p. 349):

> It is argued that when the tax is on the privilege of receiving, the tax is indirect because it may be avoided, whereas here the tax is inevitable and therefore direct. But that matter also is disposed of by *Knowlton* v. *Moore*, not by an attempt to make some

scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; "has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy." 178 U. S. 81–83. Upon this point a page of history is worth a volume of logic.

So also taxes upon particular types of sales (*Nicol* v. *Ames*, 173 U. S. 509; *Thomas* v. *United States*, 192 U. S. 363; see also *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, 446) or particular commodities (*Hylton* v. *United States*, 3 Dall. 171; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27; *Billings* v. *United States*, 232 U. S. 261; see also *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, 649) or particular methods of doing business (*Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414; see also *Doyle* v. *Mitchell Brothers Co.*, 247 U. S. 179, 183) have been repeatedly sustained as indirect taxes.

If a tax upon a designated type of transfer of property or upon the transfer of a designated type of property must be sustained as an indirect tax, it necessarily follows that a tax upon the gratuitous transfer of property *inter vivos* must be so classed.

Brown v. *Maryland*, 12 Wheat. 419, and similar cases cited on behalf of the plaintiff in error have no bearing upon the question at issue. They have been distinguished by this Court repeatedly, as in *Nicol* v. *Ames*, 173 U. S. 509, 518; *Thomas* v. *United States*, 192 U. S. 363, 371; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162–167; *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 348. It is true that where a State may not constitutionally tax a transaction in any manner whatever, an indirect method of reaching a prohibited result is unconstitutional. But as Congress has the right to lay both direct and indirect taxes if it lays them on the permitted bases (*Brushaber* v. *Union Pacific Railroad Co.*, 240 U. S. 1, 13)—to tax property if it follows the rule of apportionment and dealings in property if it follows the rule of uniformity—there would be far less reason for considering whether a federal excise tax were a subterfuge for the reaching of a prohibited end even though the tax which purported to be indirect should have in its effects some points of resemblance to a conceivable direct tax. Moreover, there is nothing exceptional in the levying of excises. They have long been recognized as appropriate and normal methods of raising revenues. Indeed, taxation by uniform laws and not by apportionment among the States constitutes the only fair method of raising the revenues necessary for the running of the Government. To say that a tax must be collected by apportionment as a direct tax is, practi-

cally, to say that it is not a possible source of revenue. Under these circumstances there certainly can not be any presumption that a tax closely analogous to taxes which have been repeatedly sustained as indirect taxes is in its essence a direct tax. On the contrary, there must be a strong presumption of its validity.

As this Court said in *Nicol* v. *Ames*, 173 U. S. 509, 515:

> It is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. * * * The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

The time has long since passed, of course, when the right to impose an excise tax is sustained upon the theory that the transaction taxed was the exercise of a privilege conferred by the sovereign authority.

> *Billings* v. *United States*, 232 U. S. 261; *Hylton* v. *United States*, 3 Dall. 171; *Thomas* v. *United States*, 192 U. S. 363.

II

THE TAX LAW IS NOT UNCONSTITUTIONAL AS APPLIED TO TRANSFERS OF PROPERTY BY GIFT DURING THE EARLIER PORTION OF THE YEAR IN WHICH THE LAW WAS PASSED

The only substantial question arising out of the retroactive features of the Act is whether they are so arbitrary and unreasonable as to violate the due-process provision of the Fifth Amendment. The other questions which have been suggested concerning the retroactivity of the law do not require discussion. We have already seen that in determining whether a tax is direct or indirect it is immaterial that the tax may not be shifted from the person on whom it first falls and that it may not be avoided in any other way. And the question whether the tax deprives the taxpayers of their property without just compensation is not a judicial question. The Constitution requires indirect taxes to be laid uniformly throughout the United States, and this tax was so laid. Neither Congress nor the courts may go further and inquire whether a particular individual is being charged more for the benefits conferred on him by the general operations of the Government than those services are worth to him; the tax must stand or fall as to all taxpayers alike. And no court can attempt to decide whether the general operations of the Government are worth less than they cost the taxpayers as a class. This is true whether the tax is entirely prospective or is

partly retroactive. The just-compensation provision has no bearing on tax cases.

It is clearly established that retroactive legislation is not unconstitutional as such. The Constitution forbids Congress to enact ex post facto laws and it forbids the States to enact ex post facto laws and laws impairing the obligation of contracts, but with these express exceptions neither federal nor state legislation is unconstitutional because it is retroactive. See, *e. g.*, *Calder* v. *Bull*, 3 Dall. 386, 391; *The Peggy*, 1 Cranch, 103, 110; *Prize Cases*, 2 Black, 635, 670, 671; *Johannessen* v. *United States*, 225 U. S. 227, 242; *Satterlee* v. *Matthewson*, 2 Pet. 380, 413; *Curtis* v. *Whitney*, 13 Wall. 68, 70; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 152, 153.

This Court has sustained state tax laws which were retroactive in scope (*Carpenter* v. *Pennsylvania*, 17 How. 456, 463; and see *Locke* v. *New Orleans*, 4 Wall. 172, 173; *Seattle* v. *Kelleher*, 195 U. S. 351, 359, 360; *State* v. *Bell*, 61 N. C. 76, 83, 86); and it has sustained similar federal taxes.

Thus, in *Stockdale* v. *Insurance Companies*, 20 Wall. 323, it sustained the Act of July 14, 1870, c. 255, 16 Stat. 256, 261, by which an earlier statute which might be supposed to have expired was revived and continued in existence for two years longer. The Court said (pp. 331, 332):

> The right of Congress to have imposed this tax by a new statute, although the measure of it was governed by the income of the past

> year, can not be doubted; much less can it be doubted that it could impose such a tax on the income of the current year, though part of that year had elapsed when the statute was passed. The joint resolution of July 4th, 1864, imposed a tax of five per cent upon all income of the previous year, although one tax on it had already been paid, and no one doubted the validity of the tax or attempted to resist it.
>
> * * * * *
>
> But where it can exercise a power by passing a new statute, which may be retroactive in its effect, the form of words which it uses to put this power in operation can not be material, if the purpose is clear, and that purpose is within the power. Congress could have passed a law to reimpose this tax retrospectively, to revive the sections under consideration if they had expired, to reenact the law by a simple reference to the sections. Has it done anything more?

This decision was followed in *Railroad Co.* v. *Rose*, 95 U. S. 78, 80.

In *Billings* v. *United States*, 232 U. S. 261, the Court sustained the Act of August 5, 1909, c. 6, 36 Stat. 11, 12, which levied a tax to be collected annually on September first on the use of foreign-built pleasure boats owned or chartered by citizens of the United States, saying (p. 282):

> Again let it be conceded that the causing the tax for the annual period to become due in September, 1909, is to give it in some respects a retroactive effect, such concession

does not cause the act to be beyond the power of Congress under the Constitution to adopt.

And in *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, it sustained the sections of the Act of October 3, 1913, c. 16, 38 Stat. 114, 166, which provided a general income tax from December to December of each year but exceptionally fixed a first period embracing the time from March 1 to December 31, 1913. This limited retroactivity was assailed as repugnant to the due process clause of the Fifth Amendment. The Court (p. 20) declared that this contention was not entitled to further consideration, citing *Stockdale* v. *Insurance Companies, supra.*

So also, without discussing the validity of retroactive taxation, the Court in *Railroad Co.* v. *Collector*, 100 U. S. 595, 597, sustained that portion of the Act of July 13, 1866, c. 184, 14 Stat. 98, 138, 139, which imposed upon corporations a tax measured by the interest paid on their bonds, the case involving interest on bonds issued long before the law was enacted; in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, it sustained the provisions of the Act of August 5, 1909, c. 6, 36 Stat. 11, 112, 114, which based a tax upon the net income from the then current calendar year; and in *Hecht* v. *Malley* 265 U. S. 144, 164, it enforced the retroactive feature of the revenue law which was enacted February 24, 1919 (c. 18, 40 Stat. 1057, 1126) and which levied taxes for the entire year ending June 30, 1919.

The retroactive taxes imposed by the gift tax law which is now before this Court were sustained by the Circuit Court of Appeals for the Second Circuit in *Anderson* v. *McNeir*, 16 F. (2d) 970.

The authorities which have been cited fully establish the broad general rule that Congress may constitutionally impose retroactive taxes. And the circumstances attending the enactment of the tax provision which is involved in the present case show no justification for this challenge of its validity.

Earlier efforts to establish gift taxes were referred to in the debates on this bill. (65 Cong. Rec., pt. 3, p. 3122; pt. 4, pp. 3172, 3173; pt. 8, p. 8295.) It is sufficient, however, to point out that on February 25, 1924, in the Committee of the Whole House, Chairman Green, of the Committee on Ways and Means, proposed an amendment to the revenue bill which embodied the principle of the gift tax now under consideration. At that time he said (65 Cong. Rec. pt. 3, pp. 3119, 3120):

> Mr. Chairman, a gift tax is a corollary to an estate tax. It is perfectly idle to attempt to raise the estate tax, as we have done to-day, and make no provision with reference to gifts. The estate tax at the present time is being largely evaded by the splitting up of the large estates. I, myself, know of one large estate which has been divided into four parts by the owner thereof giving to his wife one part and one part to each of his three

children. The gifts were made outright. They are absolute in form. They can not be attacked by the Treasury. But at the same time the man who made them has never lost control over the property. He now has as much control over the property as he ever had.

This amendment also is needed on account of the income tax. The splitting up of large estates, of course, reduces the amount of surtaxes to be laid upon the party who so divides them. We have lost more, in my judgment, by the division of these large estates in our income taxes than we have lost by reason of tax-exempt securities, and we have lost millions upon millions by reason of tax-exempt securities.

On the following day he proposed a modification of the terms of his amendment. (65 Cong. Rec., pt. 4, p. 3170.) On that day he said (p. 3172):

Ever since I was connected with revenue matters, ever since I have been on the Ways and Means Committee, I have been endeavoring to get a gift tax inserted in the law. I proposed it at the first session when I was a member of that committee some 10 years ago. Ever since that time I have been laboring to get it inserted in the law, because I knew just exactly what would happen, namely, that these big estates would be gradually split up into different parts, thereby defeating both the income tax and the inheritance tax, and that is the reason our

revenues are so rapidly decreasing from the big estates.

On May 8, 1924, when the bill was before the Senate sitting as in Committee of the Whole, the Finance Committee proposed to strike out the gift tax provisions of the House bill, but Senator Walsh, of Massachusetts, proposed substitute sections imposing gift taxes, and his amendment was accepted by the Senate. (65 Cong. Rec., pt. 8, pp. 8094–8097.) At that time Senator Walsh said (pp. 8095, 8096):

> There are provisions under the present law to tax gifts in anticipation of death. A gift made within a two-year period prior to death is presumed to be a gift in anticipation of death and is included within the property that passes under the estate or inheritance tax. But there is no provision of law imposing a tax upon gifts between the living; and the greatest evasion of all evasions of the income tax has been the making of gifts by the head of a family to his wife and children, either directly or through trusts, for the purpose of having his income so reduced that he would fall within the lower brackets.
>
> * * * * *
>
> Again and again an effort has been made to impose some form of gift tax. In the last tax bill the Senate imposed a gift tax. It was stricken out in conference. At this session the House has imposed a gift tax and the Senate committee has recommended its removal. If the Senate now goes on record

in favor of some form of gift tax, it will be enacted. It will be a question merely of rates, because the House has already committed itself.

Personally, I think we are acting when it is too late. I think the bird has flown. I think that so many and so extensive gifts have been made in the last seven years that it is almost impossible to collect anything under a gift tax. But that does not justify leaving the door wide open for a man to continue to make gifts which will permit him to escape the fair and just income and inheritance taxes imposed upon him under the law.

The purpose of gifts inter vivos is to lower the income tax by splitting up the volume of the taxable property.

Senator Simmons, the ranking minority member of the Finance Committee, added (p. 8996):

Mr. President, I do not as a general proposition feel disposed to give my assent to the principle involved in gift taxes. In ordinary conditions I would say that it is not a wise way of raising revenue for the Government. But conditions which confront us are abnormal and seem to me to make the imposition of a tax of this sort absolutely essential.

There are two kinds of taxes which we find it necessary to levy in the conditions which now obtain. One is the income tax, the other is the inheritance tax. From both

of those taxes the Government realizes a very large amount of revenue, revenue that it can not dispense with, that is absolutely necessary to enable us to finance the Government. One of the favorite methods of evading the income tax is through the splitting up of large incomes among members of the family, thus evading the higher rates imposed by surtaxes. That has been very generally resorted to especially by men of large incomes and the Government has lost an immense amount of revenue through that means of evasion.

The inheritance tax also has been extensively evaded in the same way. We have had no provision in the law up to this time that has afforded anything like adequate protection to the Government against those two methods of evasion. We have no statistics. Probably no statistics are available under any conditions, but we have none which would indicate exactly the amount of revenue that has been lost by this method of evading the income tax and this method of evading the estate tax as now imposed. But they have been sufficiently large and extensive, as is now generally conceded, to very greatly impair the revenues of the Government. It is a leak that ought to be stopped, and there is absolutely no way to stop it except by the imposition of a gift tax.

The gift-tax provision was further amended on the report of the conferees of the two Houses but

in respects not material to the present discussion. (65 Cong. Rec., pt. 9, pp. 9530, 9536, 9537.) The amendments to the bill which were approved by the conferees were accepted by the Senate on May 24 (65 Cong. Rec., pt. 9, p. 9421) and by the House of Representatives on May 26 (65 Cong. Rec., pt. 9, p. 9547). The bill was approved by the President on June 2, 1924.

The certificate from the Circuit Court of Appeals states that the gifts under consideration were made between January first and the approval of the law, but it does not say that they were made before February 26, when the House of Representatives decided that such gifts should be taxed (65 Cong. Rec., pt. 4, p. 3177); it does not say that they were made before May 8, when the Senate voted in favor of such a tax (65 Cong. Rec., pt. 8, p. 8097) and thus showed that some form of gift tax would appear in the bill when it came from the conferees; it does not say that the gifts were made before the bill in its final form had passed both Houses. It simply says that these transfers were made before the President had actually approved the law, a number of days after it was submitted to him. For all that appears, the gifts were not made more than a day before the law was approved.

As this Court will not consider the validity of a law except in so far as it affects the parties actually before the Court and the facts shown as to those

parties, the only question which is here necessarily involved is whether Congress may constitutionally tax a transfer by gift made while Congress is enacting the tax law or even after both Houses of Congress have passed the law and it is awaiting the action of the President. This case is not like that of *Nichols* v. *Coolidge*, No. 88, Oct. Term, 1926; decided May 31, 1927. There the Act of Congress reached back and dealt with a transfer which took place a dozen years before the law was passed and attributed to the property its value long after the transfer, and this Court said of such a law that it was "arbitrary, capricious and amounts to confiscation." Indeed, that is the only ground upon which an excise tax, uniform throughout the United States, may be declared unconstitutional, assuming, of course, that the law has been enacted in the manner prescribed by the Constitution. Here the property is valued as of the date of the gift and, so far as appears, the law has not in this case reached back an entire day. These transfers were made after the taxpayer had been warned that Congress proposed to tax them. Under such circumstances, it is submitted, the tax can not be considered arbitrary and unreasonable. Tax laws which were fully as retroactive as that which is involved in the present case have been sustained by this Court repeatedly. We submit that those decisions are controlling.

III

A TAX UPON THE TRANSFER BY GIFT OF STATE AND MUNICIPAL BONDS IS NOT A TAX UPON THOSE BONDS AND MAY BE IMPOSED BY CONGRESS WITHOUT UNCONSTITUTIONALLY INTERFERING WITH THE OPERATIONS OF THE GOVERNMENTS ISSUING SUCH BONDS

In *Greiner* v. *Lewellyn*, 258 U. S. 384, it was expressly decided that the Act of Congress taxing the transfer of estates by death applied even to that part of an estate which consisted of municipal bonds, and that so construed the Act was constitutional. The Court there said (p. 387):

> A State may impose a legacy tax on a bequest to the United States, *United States* v. *Perkins*, 163 U. S. 625, or on a bequest which consists wholly of United States bonds, *Plummer* v. *Coler*, 178 U. S. 115; *Orr* v. *Gilman*, 183 U. S. 278. Likewise the Federal Government may impose a succession tax upon a bequest to a municipal corporation of a State, *Snyder* v. *Bettman*, 190 U. S. 249, or may, in determining the amount for which the estate tax is assessable, under the Act of 1916, include sums required to be paid to a State as inheritance tax, for the estate tax is the antithesis of a direct tax, *New York Trust Co.* v. *Eisner*, 256 U. S. 345. Municipal bonds of a State stand in this respect in no different position from money payable to it. The transfer upon death is taxable, whatsoever the character of the property transferred and to whomsoever the transfer is

made. It follows that in determining the amount of decedent's net estate municipal bonds were properly included.

The tax here involved is not upon the property nor upon the government whose securities are involved, but upon the transfer.

It is submitted that the gratuitous transfer of an obligation by death and its gratuitous transfer *inter vivos* affects the obligee alike and that as the former may be taxed constitutionally the latter also is subject to the taxing power of the Federal Government.

It is true that an Act of Congress taxing state and municipal bonds or the income from such bonds would be unconstitutional. A tax upon their sale would quite probably so affect the market value of those bonds and thus the borrowing power of the governments which issued them as to be invalid for that reason. But a tax upon transfers by gift does not have such an effect. While bonds are bought and sold for investment and for speculative purposes, their purchase for use as gifts is not in such volume as to affect their price and a tax upon their transfer by gift does not affect their market value. In *Plummer* v. *Coler*, 178 U. S. 115, 137, where it was claimed that the remote effect of a tax would be to impair the borrowing power of a government, this Court said that courts should have something more to act upon than mere conjecture; the injury should be obvious and appreciable. The effect of

such a tax as is here involved upon the borrowing power of the state and municipal governments is not merely insignificant; it is wholly conjectural; it is highly improbable that the tax has any effect whatever upon the value of such securities. Certainly such a tax would have a more remote effect upon the state and municipal governments than the federal income tax which was applied to persons deriving incomes from state and municipal governments as independent contractors and was sustained by this Court in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

The tax is not levied upon governmental securities but upon their transfer; and, moreover, its effect upon the state and municipal governments which have issued such securities is merely conjectural, and for that reason is not entitled to consideration.

CONCLUSION

Each of the questions asked by the Circuit Court of Appeals should be answered in the negative. In dealing with the second question, this Court may possibly deem it proper to restrict its answer to the statement that at least, so far as the taxpayer here involved is concerned, there is certainly nothing unreasonable in the retroactive aspects of the gift tax; but the decisions of this Court in numerous other cases justify the broader statement that there was nothing unreasonable in making the tax on the

transfer of gifts retroactive to the beginning of the calendar year in which the law was enacted.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED A. WHEAT,
ROBERT P. REEDER,
Special Assistants to the Attorney General.

SEPTEMBER, 1927.

Appendix

(Act of June 2, 1924, c. 234, 43 Stat. 253; U. S. C., Title 26, Secs. 1131–1136)

Sec. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly:

[Here follow the rates of tax.]

Sec. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Sec. 321. In computing the amount of the gifts subject to the tax imposed by section 319, there shall be allowed as deductions:

(a) In the case of a resident—

(1) An exemption of $50,000;

(2) The amount of all gifts or contributions made within the calendar year to or for the use of the United States, any State, Territory, any politi-

cal subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees, or fraternal society, order, or association, operating under the lodge system, but only if such gifts or contributions are to be used by such trustee or trustees or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year by such corporation, trustee, or fraternal society, order, or association for a religious, charitable, scientific, literary, or educational purpose, or for the prevention of cruelty to children or animals, and the amount of all gifts or contributions made within the calendar year to the special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act;

(3) Gifts the aggregate amount of which to any one person does not exceed $500;

(4) An amount equal to the value of any property transferred by gift within the calendar year, which can be identified (A) as having been received by the donor within five years prior to the time of his making such gift, either from another person by gift or from a decedent by gift, bequest, devise, or inheritance, or (B) as having been acquired in exchange for property so received. This deduction

shall be allowed only where a gift tax or an estate tax under this or any prior act of Congress was paid by or on behalf of the donor or the estate of such decedent, as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such decedent, and only to the extent that the value of such property is included in the total amount of gifts made within the calendar year and not deducted under paragraph (2) or (3) of this subdivision.

SEC. 322. In case a tax has been imposed under section 319 upon any gift, and thereafter upon the death of the donor the amount thereof is required by any provision of Part I of this title to be included in the gross estate of the decedent then there shall be credited against and applied in reduction of the estate tax, which would otherwise be chargeable against the estate of the decedent under the provisions of section 301, an amount equal to the tax paid with respect to such gift; and in the event the donor has in any year paid the tax imposed by section 319 with respect to a gift or gifts which upon the death of the donor must be included in his gross estate and a gift or gifts not required to be so included, then the amount of the tax which shall be deemed to have been paid with respect to the gift or gifts required to be so included shall be that proportion of the entire tax paid on account of all such gifts which the amount of the gift or gifts required to be so included bears to the total amount of gifts in that year.

SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section

321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange.

SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301.

○

FILED
OCT 3 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 154.

JOHN W. BLODGETT,
Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
BLOUNT RALLS,
Office & P. O. Address,
44 Wall Street,
Borough of Manhattan,
New York City.

INDEX.

PAGE

Table of Cases iii
Commentaries iv
Motion for Leave to File Brief as *Amici Curiae* 1
Notice of Motion for Leave to File Brief as *Amici Curiae* 3
Consent of Solicitor General to File Brief 4
Consent of Counsel for Plaintiff-in-error to File Brief .. 5
The Questions Presented 6
The Statute 7
Synopsis of Argument 9

ARGUMENT:

I. The powers of Congress to tax and the limitations imposed thereon are set forth with particularity in the Constitution 11

II. The gift tax is a direct tax and since not apportioned is unconstitutional 12

(1) The distinction between a direct tax and an indirect or excise tax is fundamental. A direct tax is one levied on the *general ownership* of property; an indirect tax is one on the exercise of some *particular privilege* or vocation, enjoyment of some *special use* 12

(2) A tax upon any essential incident of ownership is a tax upon the ownership of property, and so a direct tax 17

(3) The natural and universally recognized right to relinquish the ownership of property by gift is an essential attribute of property and inseparable from ownership 21

PAGE

(4) The fact that the act purports to tax not the property given but the transfer of the property does not the less make the tax a direct tax 27

(5) A gift tax is novel to English and American jurisprudence. It was for the first time made a part of the fiscal system of any nation in 1924. It was entirely unknown to legislators or economists at the time the Constitution was adopted 38

III. Even if the gift tax is an indirect tax when applied prospectively, its retroactive application results in taxing property directly, and since not apportioned it is unconstitutional as applied retroactively 40

Conclusion 41

Appendix 42

Table of Cases.

PAGE

Anderson v. McNeir, 16 F. (2d) 970 ..... 25, 30, 36
Billings v. United States, 232 U. S. 261 ..... 15, 31, 33, 42
Board of Commissioners v. Rocky Mt. News Printing Co., 61 Pac. 494, 496 23
Brown v. Maryland, 12 Wheat. 419 21
Brushaber v. Union Pac. R. R. Co., 240 U. S. 1 14
Buchanan v. Warley, 245 U. S. 60, 74 ..... 22, 29
Craig v. Taylor & Sons, 192 Ky. 36 13
Dawson v. Kentucky Distilleries Co., 255 U. S. 288 ..... 13, 14, 25, 29, 37, 44, 45
Eisner v. Macomber, 252 U. S. 189 13
Flint v. Stone Tracy Co., 220 U. S. 107 15
Genet v. Hunt, 113 N. Y. 158, 170 22
Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, 320 18
Hylton v. United States, 3 Dall. 171 14
Kansas City Ry. Co. v. Botkin, 240 U. S. 227 29
Keeney v. New York, 222 U. S. 525 ..... 28, 33, 42
Knowlton v. Moore, 178 U. S. 41 ..... 13, 15, 28, 36
Kuhn v. Common Council, 70 Mich. 531 23
Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283 28
McCray v. United States, 195 U. S. 27 15
McNeir v. Anderson, 10 F. (2d) 813 ..... 25, 32, 33, 37
New York Trust Company v. Eisner, 256 U. S. 345, 349 ..... 15, 28, 36, 37, 44
Nichols v. Coolidge, U. S. Supreme Court No. 88, decided May 31, 1927 ..... 27, 35, 39
Nicol v. Ames, 173 U. S. 509, 515, 516 ..... 12, 15, 27, 37, 45
Patton v. Brady, 184 U. S. 608 ..... 15, 33, 42
Pollock v. Farmers' Loan & Trust Company, 157 U. S. 429 ..... 14, 25, 37, 45
Pollock v. Farmers' Loan & Trust Company (Rehearing), 158 U. S. 601 ..... 13, 41

PAGE

Powell v. Pennsylvania, 127 U. S. 678, 684 29
Schlesinger v. Wisconsin, 270 U. S. 230 ..... 34, 35
Scholey v. Rew, 23 Wall. 331 43
Thomas v. United States, 192 U. S. 363, 370 ..... 14, 15
Thompson v. McLeod, 112 Miss. 383, 73 So. 193 ..... 14, 20
Thompson v. Kreutzer, 112 Miss. 165, 167, 72 So. 891 .. 13, 20
Todd v. Wick Bros., 36 Ohio State 380, 385 23
United States v. Perkins, 163 U. S. 625 ..... 15, 28
Veazie Bank v. Fenno, 8 Wall. 533 15
Wynehamer v. The People, 13 N. Y. 378, 396 23

Commentaries.

Blackstone, Brook 1, Chap 138 21
Coke on Littleton, Lib. 1, Chap. 1, Sec. 1, p. 4-b 21
Corpus Juris, 12, p. 945, §459 29
Kant, Critique of Reason 18
Kent's Commentaries, Part IV, pp. 320, 501 22
Rutherford, Institutes of Natural Law, 1799 Ch. 3, p. 53 22
Sugden, Treatise on Powers, 8th Ed., p. 314 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

JOHN W. BLODGETT, Plaintiff-in-Error, against CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant-in-Error.	No. 154.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for William C. Cannon in the case of *William C. Cannon* v. *United States* now pending in the Court of Claims of the United States, respectfully move this Honorable Court for leave to file the accompanying brief in this case as *amici curiae*.

There is now pending in the Court of Claims the case of *William C. Cannon* v. *United States*, No. E-595, wherein the undersigned appears as counsel for the claimant. The sole issue raised in such case is the constitutionality of the Federal gift tax provisions of the Revenue Act of 1924. The case was set for hearing before the Court of Claims on January 3, 1927, but on being advised that the Circuit Court of Appeals for the Sixth Circuit a few days before had asked instruc-

tions of this Honorable Court upon the constitutionality of the Federal gift tax for its guidance in the Blodgett case, the Court of Claims refused to hear the Cannon case and transferred it to the general calendar, pending the decision of this Honorable Court on the questions certified.

WHEREFORE, motion is respectfully made for permission to file the accompanying brief.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
BLOUNT RALLS,
Attorneys for William C. Cannon.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

JOHN W. BLODGETT, Plaintiff-in-Error, against CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant-in-Error.	No. 154.

NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*.

SIRS:

PLEASE TAKE NOTICE that upon the annexed motion for leave to file brief as *amici curiae* and brief, the undersigned will move this Honorable Court at the October Term, 1927, thereof, to be held in the Capitol at the City of Washington, District of Columbia, on the 3rd day of October, 1927, at the opening of court on that day or as soon thereafter as counsel can be heard for permission to file a brief as *amici curiae* in this case.

Dated, New York, August 23, 1927.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
BLOUNT RALLS,
44 Wall Street,
Borough of Manhattan,
New York City.

To:

THE HONORABLE THE SOLICITOR GENERAL
OF THE UNITED STATES,
Department of Justice,
Washington, D. C.

MARK NORRIS, Esq.,
Attorney at Law,
Grand Rapids, Michigan.

Consent of Solicitor General to File Brief.

Department of Justice

WMS-EP

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C.

August 29, 1927.

Montgomery B. Angell, Esq.,
c/o Davis, Polk, Wardwell, Gardiner & Reed,
44 Wall Street,
New York City.

In re: *Blodgett* v. *Holden*, No. 154, *October Term, 1927.*

Dear Sir:

In reply to your letter of the 23rd instant, you are advised that this office has no objection to the filing of a brief by Mr. Davis and you as *amici curiae* in the above case.

When your brief is in final print, please send this office several copies.

Very truly yours,

(Signed) GARDINER T. LLOYD,
Acting Solicitor General.

Consent of Counsel for Plaintiff-in-Error. to File Brief.

NORRIS, MCPHERSON, HARRINGTON & WAER
Attorneys & Counsellors
1107-1111 Grand Rapids Savings Bldg.
Grand Rapids, Mich.

September 2, 1927.

Messrs. Davis, Polk, Wardwell, Gardiner & Reed,
44 Wall Street,
New York, New York.

Gentlemen:

In regard to your filing a brief as friend of the court in the case of Blodgett vs. Holden, please be advised that as counsel for plaintiff-in-error I consent to your doing so.

I thank you for the copy of the brief forwarded to me.

Yours very truly,

(Signed) MARK NORRIS.

MN:W

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

JOHN W. BLODGETT,
Plaintiff in Error,

against

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant in Error.

No. 154.

BRIEF AS *AMICI CURIAE*.

The Questions Presented.

It is proposed in this brief to consider only those fundamental questions of law upon which the conclusions of this Honorable Court in reaching its decision herein must be predicated. The discussion will be limited to a consideration of the following points:

1.

The Federal gift tax imposed by Sections 319 to 324 of the Revenue Act of 1924 is a direct tax and since not apportioned is unconstitutional.

2.

Even if the gift tax is an indirect tax when applied prospectively, its retrospective application results in taxing property directly, and since not apportioned it is unconstitutional as applied retroactively.

The Statute.

Title III, Part II of the Revenue Act of 1924, in Section 319 thereof, imposes a graduated tax ranging from 1% on taxable gifts of less than $50,000 to 40% on taxable gifts exceeding $10,000,000, as follows:

> "For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly."

It is provided in Section 320 that:

> "If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift."

And further:

> "Where property is sold or exchanged for less than a fair consideration in money or moneys worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by Section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

Section 321 makes provision for certain specific deductions in the case (a) of a resident, and (b) of a non-resident.

Section 322 provides that in case the donor of a gift subject to tax under Section 319 dies and the amount of such gift is properly included in the decedent's gross estate, the amount of gift tax shall be credited against and applied as a reduction of the estate tax.

Section 323 and Section 324 are as follows:

> SEC. 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess

of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year (other than the gifts specified in paragraph (3) of subdivision (a) and in paragraph (2) of subdivision (b) of section 321), and the fair market value thereof when made, and also all sales and exchanges of property owned by him made within such year for less than a fair consideration in money or money's worth, stating therein the fair market value of the property so sold or exchanged and that of the consideration received by him, both as of the date of such sale or exchange.

SEC. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301.

From these provisions it will be apparent that the Act imposes—

(1) A general tax on *all* gifts of *any* property *wherever situated*, and that whether the gift is made *directly* or *indirectly*,

(2) The tax is a graduated tax based on the value of the property given,

(3) The tax is imposed on the donor and is applicable to *any* person "who within the year 1924 or any calendar year thereafter" makes *any* gift in excess of the deductions allowed, and

(4) The tax is levied against resident donors regardless of where the property is located, i. e., whether within or without the United States, and against non-resident donors as to any property located in the United States at the time of the gift.

What could possibly be broader than these provisions of law? Every conceivable kind of transfer falls within its terms. The tax is not imposed on a limited class of transfers,

but is levied generally on *all* transfers of *any kind or variety* of property, wheresoever made, the sole limitation being that it applies only to transfers by way of gift.

It should be remembered that although the present Act allows certain exemptions, such as a specific credit of $50,000 and a deduction for charitable gifts, the constitutionality of the tax as a gift tax is unaffected by these provisions. If it is constitutional to tax a gift in excess of $50,000, it is equally constitutional to tax a gift of $10; and if it is constitutional to tax a gift to a stranger, it is equally constitutional to tax a gift to a charitable or religious institution.

SYNOPSIS OF ARGUMENT.

I.

The powers of Congress to tax and the limitations imposed thereon are set forth with particularity in the Constitution.

II.

The gift tax is a direct tax and since not apportioned is unconstitutional.

(1)

THE DISTINCTION BETWEEN A DIRECT TAX AND AN INDIRECT OR EXCISE TAX IS FUNDAMENTAL. A DIRECT TAX IS ONE LEVIED ON THE *GENERAL OWNERSHIP* OF PROPERTY; AN INDIRECT TAX IS ONE ON THE EXERCISE OF SOME *PARTICULAR PRIVILEGE* OR VOCATION, OR THE ENJOYMENT OF SOME *SPECIAL USE*.

(2)

A TAX UPON ANY ESSENTIAL INCIDENT OF OWNERSHIP IS A TAX UPON THE OWNERSHIP OF PROPERTY, AND SO A DIRECT TAX.

(3)

THE NATURAL AND UNIVERSALLY RECOGNIZED RIGHT TO RELINQUISH THE OWNERSHIP OF PROPERTY BY GIFT IS AN ESSENTIAL ATTRIBUTE OF PROPERTY AND INSEPARABLE FROM OWNERSHIP.

(4)

THE FACT THAT THE ACT PURPORTS TO TAX NOT THE PROPERTY GIVEN BUT THE TRANSFER OF THE PROPERTY DOES NOT THE LESS MAKE THE TAX A DIRECT TAX.

(5)

A GIFT TAX IS NOVEL TO ENGLISH AND AMERICAN JURISPRUDENCE. IT WAS FOR THE FIRST TIME MADE A PART OF THE FISCAL SYSTEM OF ANY NATION IN 1924. IT WAS ENTIRELY UNKNOWN TO LEGISLATORS OR ECONOMISTS AT THE TIME THE CONSTITUTION WAS ADOPTED.

III.

Even if the gift tax is an indirect tax when applied prospectively, its retroactive application results in taxing property directly, and since not apportioned it is unconstitutional as applied retroactively.

IV.

Conclusion.

ARGUMENT.

I.

The powers of Congress to tax and the limitations imposed thereon are set forth with particularity in the Constitution.

The taxing powers granted to Congress and the extent and limitations thereof are set forth in the Constitution of the United States in no uncertain terms. These are:

Article I, Section 8, Clause 1:

> "To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

Article I, Section 2, Clause 3:

> "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other persons."

Article I, Section 9, Clause 4:

> "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

Article I, Section 9, Clause 5:

> "No Tax or Duty shall be laid on Articles exported from any State."

The foregoing requirements are categorical and permit of no modification. It lies within the scope of congressional

activity to impose direct taxes and to lay and collect imposts and excises. Direct taxes must, however, be apportioned in accordance with the census; indirect or excise taxes must be uniform throughout the United States; no tax or duty whatsoever may be laid upon articles exported from any state. The requirement that direct taxes shall be apportioned appears twice, once in the affirmative and once in the negative form. The emphasis given by this repetition is perhaps unique in the entire instrument.

II.

The gift tax is a direct tax and since not apportioned is unconstitutional.

(1)

THE DISTINCTION BETWEEN A DIRECT TAX AND AN INDIRECT OR EXCISE TAX IS FUNDAMENTAL. A DIRECT TAX IS ONE LEVIED ON THE *GENERAL OWNERSHIP* OF PROPERTY; AN INDIRECT TAX IS ONE ON THE EXERCISE OF SOME *PARTICULAR PRIVILEGE* OR VOCATION, OR THE ENJOYMENT OF SOME *SPECIAL USE*.

The distinction between a direct tax and an indirect or excise tax is fundamental in Constitutional law. However difficult the task in any given case may be, the Courts must recognize and enforce the distinction, for, as Mr. Justice Peckham put it in *Nicol* v. *Ames*, 173 U. S. 509, 515, "The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States."

In the beginning the line of demarkation was very indistinct. Alexander Hamilton complained that "It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution." But gradually, by succeeding decisions of the Supreme Court, a line has become worn, which while perhaps not susceptible of easy ap-

plication, serves as a clear indication of the difference in classification. The rule may be expressed thus: A tax on the person or on his property *by reason of general ownership* is a direct tax; a tax on the exercise of some *particular privilege* or vocation, or the enjoyment of some *special use* of the property in an indirect tax.

The legal definitions, while not as helpful as the decided cases, indicate the fundamental difference between the two classes of taxes and are worth some attention. In *Eisner* v. *Macomber*, 252 U. S. 189, after asserting that Congress had power to tax shareholders upon their property interests in shares of corporations, the Supreme Court continued (p. 217):

> "But that this would be taxation of property because of ownership, and hence would require apportionment • • • is settled beyond peradventure by previous decisions of this Court."

Again in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, the Court said (p. 294):

> "To levy a tax by reason of ownership of property is to tax the property."

And in *Knowlton* v. *Moore*, 178 U. S. 41, Mr. Justice White, who vehemently dissented in the two *Pollock* v. *Farmers' Loan & Trust Co.* cases, 157 U. S. 429 and 158 U. S. 601, conceded that taxes "which are the essential equivalent of a tax on property generally, real or personal, solely because of its ownership" are direct taxes. Only as recently as 1921 has the Supreme Court of Kentucky given voice to this rule when in *Craig* v. *Taylor & Sons*, 192 Ky. 36, it was said (p. 39):

> "The mere right to own and hold property cannot be made the subject of excises, since the levying of a tax by reason of ownership of property is to tax the property."

Again, the Supreme Court of Mississippi has said in *Thompson* v. *Kreutzer*, (Miss.) 72 So. 891:

> "No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership, which is not also a tax on property."

On the other hand, Mr. Chief Justice Fuller's definition of an excise tax in *Thomas* v. *United States*, 192 U. S. 363, 370, is fairly comprehensive:

> "There is no occasion to attempt to confine the words duties imposts and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."

But the actual decisions in the cases themselves more clearly indicate the line of demarkation. On the one hand a poll or capitation tax and a tax on land are direct taxes. *Hylton* v. *United States*, 3 Dall. 171; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601; *Brushaber* v. *Union Pac. R. R. Co.*, 240 U. S. 1. So is a tax on income derived from real or personal property (*Pollock* v. *Farmers' Loan & Trust Co.*, supra, *Brushaber* v. *Union Pac. R. R. Co.*, supra), a tax on the right to take possession of whiskey from a bonded warehouse (*Dawson* v. *Kentucky Distilleries Co.*, (255 U. S. 288), a tax on a stock dividend (*Eisner* v. *Macomber*, 252 U. S. 189), a tax on the extraction of turpentine from trees (*Thompson* v. *McLeod*, 112 Miss. 383, 73 So. 193). In every instance the tax in question was imposed solely by reason of the *general ownership* of the property.

Where, however, the tax is not upon the *general ownership* of property but upon the exercise of some *particular privilege* or *special use* to which the property is put, then the tax is an indirect or excise tax. For instance, a tax upon carriages kept for private use was held to be an excise tax. *Hylton* v. *United States*, 3 Dall. 171. So also was a tax upon the priv-

ilege of issuing bank notes (*Veazie Bank* v. *Fenno*, 8 Wall. 533), a stamp tax on the sale of commodities on boards of trade and exchanges (*Nicol* v. *Ames*, 173 U. S. 409), death duties on the succession, inheritance and transfer of property at death (*United States* v. *Perkins*, 163 U. S. 625; *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust Co.* v. *Eisner*, 256 U. S. 345), a tax on tobacco manufactured for consumption imposed at a period intermediate the commencement of manufacture and the final consumption of the article (*Patton* v. *Brady*, 184 U. S. 608), a tax upon the sales of shares of stock in corporations (*Thomas* v. *United States*, 192 U. S. 363), a tax on the carrying on of a business in corporate form (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107), a tax on colored oleomargarin (*McCray* v. *United States*, 195 U. S. 27), a tax upon the use of foreign built yachts (*Billings* v. *United States*, 232 U. S. 261). In every instance the tax was upon some peculiar privilege enjoyed or special use undertaken.

In *Knowlton* v. *Moore*, *supra*, the court said (p. 81) that a tax on legacies was an excise tax "because of the particular occasion which gives rise to its levy". In the *Patton* case, *supra*, involving a tax on the manufacture and sale of tobacco, the tax was upheld as an indirect tax because it was a tax (p. 619) "on certain kinds of property, having reference to their origin and their intended use". In the *Thomas* case, *supra*, the tax on the sale of shares of stock represented by certificates was held an excise tax on the ground that (p. 371) "the sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates". In the *Stone Tracy Company* case, *supra*, where a tax on carrying on business in a corporate capacity was upheld as an excise tax, the Court said (p. 151):

> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from cor-

> porate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies. * * * If business is not done in the manner described in the statute, no tax is payable."

And again (p. 150):

> "In the present case, the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed * * *."

And again (p. 151):

> "The difference between the acts [i. e., receiving income and doing business] is not merely nominal, but rests upon substantial differences between the *mere ownership of property* and the actual doing of business *in a certain way*." (Italics ours.)

Perhaps the best statement of the distinction between direct and indirect taxes is that given by Mr. Justice Peckham in *Nicol* v. *Ames*, *supra*, where he said (p. 521):

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. *It takes no notice of any kind of privilege or facility, and the fact of sale is alone regarded.*" (Italics ours.)

Thus, in the *Billings* case, *supra*, where a tax on the use of foreign built yachts was held an excise tax, what the statute taxed was not the *ownership* of the yacht, but the *particular use* of the yacht *for pleasure purposes*, that is, the tax was imposed upon the *use* of the yacht *as a yacht*. Such a tax is quite different from a general tax on *all* income from property, as in the *Pollock* cases, or a tax on obtaining *possession* of property, as in the *Kentucky Distilleries* case, or it is submitted, a general tax on the *disposal* of any and every kind of property, as in the instant case.

From the foregoing it is apparent that a tax is on property when it is levied because of the *mere ownership* of such property. Now ownership means nothing more nor less than the *relationship* of the owner to the thing. Property has no value in the eyes of the law, except in so far as it confers advantages upon the owner. Or as Alexander Hamilton put it: "What in fact is property, but a fiction, without the beneficial use of it?" Consequently, as Mr. Justice Brandeis said in the *Kentucky Distilleries* case, *supra*, page 294, "To levy a tax by reason of ownership of property is to tax the property". This being the case, how shall we determine and define taxes which fall upon the ownership of property, as distinguished from excise taxes upon some particular privilege or special use to which that property is put?

(2)

A TAX UPON ANY ESSENTIAL INCIDENT OF OWNERSHIP IS A TAX UPON THE OWNERSHIP OF PROPERTY, AND SO A DIRECT TAX.

Both on principle and authority, a tax which is levied upon one or more of the *essential incidents* of ownership is a tax upon ownership and so a direct tax. It is this principle which the Supreme Court established beyond peradventure in the two *Pollock* cases, and if there is anything left of the decision in those cases, this principle must be taken as fundamental.

Prior to the decision in the two *Pollock* cases it had generally been considered that only a poll or capitation tax or a "tax on land", as the expression went, were direct taxes. This limitation the Supreme Court refused to accept, but, sweeping aside with some impatience the loose expression "a tax on land", it showed by clear analysis that it is impossible to conceive of taxing a thing except by taxing one or all of the *essential incidents of the ownership* of that thing, and that one of those essential incidents was the right to receive

the income derived from the property owned. Obviously, that which primarily gives value to property is the rents and profits derived therefrom. "We find it impossible," said the Court in the course of its opinion on rehearing (158 U. S. 601, 628), "to hold that a fundamental requisition [i. e., the requirement that direct taxes be apportioned], deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself."

Property in the abstract is meaningless. Property is in reality nothing more nor less than the sum of those *fundamental incidents* which the law has always recognized as attaching to the owner of property. *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308, 320. In his Critique of Pure Reason Emanuel Kant endeavored to distinguish between the "ding an sich" or the thing in itself, and its external attributes, such as shape, color, etc. He sought to show that there is something beyond and in addition to the physical attributes of an object. This may be well enough for philosophers and metaphysicians, but such a conception is quite foreign to our daily life and certainly has no place in the theory of the law. Those rights which attach to what we call ownership themselves *are* ownership in legal cognizance. Take, for example, a chair. The chair is of value to its owner not because of the "thing in itself", but because of the fact that it serves a particular use, or is pleasing to the eye, or may be sold and its value realized in another thing more desirable. Beyond what these external qualities may give, the owner of the chair has nothing.

The Supreme Court of Michigan, in *Grand Rapids Booming Co.* v. *Jarvis*, *supra*, p. 320, expressed it in this way:

> "Of what does property practically consist but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to the lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that

> dreams are made of?' Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practically valuable to him? • • • Property does not consist merely of the right to the ultimate particles of matter of which it may be composed, • • • but of those properties of matter which can be rendered manifest to our senses and made to contribute to our wants or our enjoyments."

What we call "property" is that which attaches to ownership and gives it value. It is nothing more nor less than the opportunity secured to the owner freely to enjoy undisturbed and without restraint, those fundamental qualities of general ownership which the law has recognized from its early beginnings, namely, possession, use, the receipt of rents and profits (or income) and the power of disposal. A tax upon any or all of these fundamental attributes of property is a tax upon the property itself, and consequently a direct tax within the meaning of the Constitution.

Since the decision in the *Pollock* case this doctrine has been accepted and applied in other cases. In the *Kentucky Distilleries* case, *supra*, a tax upon the owners' act in taking possession of his own property was held to be a tax on property. Justice Brandeis in the course of his opinion quoted with approval from the decision of the Court below (p. 294):

> "The thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified) for the purpose of making some one of the only uses of which it is capable, i. e., consumption, sale or keeping for future consumption or sale. • • • The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value".

In the course of his opinion, Justice Brandeis cited two Mississippi cases which are particularly pertinent. In

Thompson v. *Kreutzer*, 112 Miss. 165, 72 So. 891, the Supreme Court of Mississippi said (p. 167):

> "A tax on a thing is a tax on all its essential attributes; and a tax on an essential attribute of a thing is a tax on the thing itself • • • No definition of property can be framed which does not include the right of ownership. Consequently, no tax can be imposed on the right of ownership, which is not also a tax on property."

In the second case, *Thompson* v. *McLeod*, 112 Miss. 383, 73 So. 193, it was held that a statute imposing a tax upon the extraction of turpentine from any trees in the state was a property tax. In the course of its opinion the Court said (p. 388):

> "This act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to pull the ripe pecans from the pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

In view of these expressions of judicial opinion, it is not surprising to find that the disposal of property by sale is likewise considered one of the fundamental incidents of ownership, and a tax on the sale is a tax on the property. In distinguishing the tax under consideration in *Nicol* v. *Ames*, *supra*, from a general tax on all sales, Justice Peckham said in part (p. 521):

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon *every* sale made in *any place*. The latter tax is really and practically *upon property*. It takes no notice of any kind of privilege or facility, and *the fact of a sale is alone regarded*." (Italics ours.)

No less a jurist than Chief Justice Marshall has recognized the same principle. In *Brown* v. *Maryland*, 12 Wheat. 419, the Chief Justice said (p. 444):

> "All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

Thus, one of the essential incidents of ownership is the enjoyment of the rents and profits (*Pollock* v. *Farmers' Loan & Trust Co., supra*); another is the right of possession (*Kentucky Distilleries* case, *supra*); a third is the right of free disposition by sale (*Nicol* v. *Ames, supra*). A tax on any one of these essential incidents of ownership is a tax on the property and so a direct tax.

(3)

THE NATURAL AND UNIVERSALLY RECOGNIZED RIGHT TO RELINQUISH THE OWNERSHIP OF PROPERTY BY GIFT IS AN ESSENTIAL ATTRIBUTE OF PROPERTY AND INSEPARABLE FROM OWNERSHIP.

The incidents of ownership are manifold, but those fundamental incidents which give to property its very meaning stand out sharply. To repeat, they are the enjoyment of possession with the right of user, the receipt of rents and profits or income, if any, and the power of free disposal, whether by sale, by gift, by abandonment or by destruction. These three essential incidents of ownership have their roots deep in the common law.

In Coke on Littleton, it is said, Lib. 1, Chap. 1, Sec. 1, p. 4 b:

> "If a man seized of lands in fee, by his deed granteth the profits of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartae*, the whole land itselfe doth passe; for what is the land but the profits thereof?"

And in Blackstone we find the following: (1 Wend. Blackstone's Commentaries, Chap. 1, p. 138):

> "The third absolute right inherent in every Englishman, is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."

Again in Kent's Commentaries (14th Edition), Part IV, pp. 320, 501, it is said:

> "The exclusive right of using and transfering property follows, as a natural consequence, from the perception and admission of the right itself."

And again at page 326:

> "The power of alienation of property is a necessary incident to the right of property, and was dictated by mutual convenience and mutual wants."

The Court of Appeals of New York put it in even stronger language (*Genet* v. *Hunt*, 113 N. Y. 158, 170):

> "An unrestricted power to appoint a fee in land • • • is equivalent to ownership."

And Sugden in his *Treatise on Powers*, 8th Ed. p. 314, said:

> "A general power [of alienation] is • • • tantamount to a limitation in fee."

Rutherforth in his *Institutes of Natural Law* (1799 Ch. 3, p. 53), in speaking of the ownership of things, says that no one can prevent the owner

> "from disposing of them as he pleases, so that property • • • contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things, or by giving them away to any person, without any valuable consideration in return, or even throwing them away."

In *Buchanan* v. *Warley*, 245 U. S. 60, 74, the Supreme Court of the United States said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property."

Property, said the Supreme Court of Ohio, "in a strict legal sense • • • consists in the right to • • • use, enjoyment and disposition" (*Todd* v. *Wick Bros.*, 36 Ohio State 370, 385). "The absolute right of private property consists in the free use, enjoyment, and disposal of all one's acquisitions. • • • The right of property includes the right to dispose of it according to the will of the owner" (*Board of Commissioners* v. *Rocky Mt. News Printing Co.*, 61 Pac. 494, 496). "Property does not consist merely of the title and possession. It includes the right • • • to sell and transfer it" (*Kuhn* v. *Common Council*, 70 Mich. 534).

Perhaps the best statement of the right is found in *Wynehamer* v. *The People*, 13 N. Y. 378, 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Com., 138): 'The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Com., 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' By another author, property is defined as an 'exclusive right to things, containing not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or giving them away to any other person without consideration, or even throwing them away.' • • • These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its at-

tributes, incapable of sale, and placed without the protection of law, it were well that the attempt should be made."

It cannot be denied that the right to transfer property by sale for a consideration is one of the fundamental incidents of ownership. Without it, property would have no value. Is the natural and universally recognized right to transfer by gift any the less an essential incident of ownership? No valid distinction can be made between these kinds of transfer. As Kent said in his commentaries, the power of alienation is one of the inherent rights of property. That power is not dependent upon whether it is exercised for a consideration or by way of gift. The law is not interested in the motive in the making of a transfer. It merely insists that the right to dispose, in whatever manner the owner may desire, is a fundamental incident to the ownership of property. The deprivation of that right is as serious in the eyes of the law as the deprivation of the enjoyment of the rents and profits. A tax on the disposition by gift or abandonment is a tax upon the property itself.

This must needs be the case. Value in the eyes of the law is not necessarily money value. Value in the eyes of the law is that quality which makes property desirable. Property is just as much desirable on account of the inherent right of giving it away as of disposing of it by sale for a consideration. One man may find value in his accumulated earnings on account of the pleasure and enjoyment in giving them to his neighbor, or to charity, or to his children, while another man finds it in selling such property at what we commonly call a profit.

Judge Raymond, in his opinion below, holding the gift tax constitutional, admits that a tax upon such of the incidents of ownership as the rights to possess, sell, pledge, keep or enjoy is a tax upon one of the fundamental incidents of property and so is a direct tax, but denies that a tax on the dis-

posal of property by way of gift is a direct tax. He undertakes to sustain this distinction in part on the ground that a tax on a gift does not impose a burden on the value of property as does a tax on the disposal by sale for a consideration. We submit that in this Judge Raymond has taken much too sordid a view of the law. In a legal sense, the right to dispose of property by gift is as valuable to the owner as the right to the rents and profits, or the right to realize gain on a sale. The law does not measure the owner's right in terms of money. It respects the value attaching to the right of disposal whatever form that disposal may take, whether that of a sale for profit, or of a gift, or through destruction.

In the *McLeod* case, *supra*, a statute taxing the extraction of turpentine from trees was held a tax on property. Can it be that the tax in question, although a direct tax in the event the turpentine was sold, is an excise tax when the turpentine is extracted and delivered by way of gift to a neighbor? If a tax is direct when laid on the plucking of one's own grapes from a vineyard, is it an indirect tax when such plucking is followed by a gift of the grapes to a neighbor? If the ripe fruit of one's trees were pulled and given to a weary traveller, would the tax on such an act be an excise tax as a mere privilege, and not a direct tax on the orchard?

The Circuit Court of Appeals for the Second Circuit reversed the decision of Judge Augustus Hand in the District Court in the case of *McNeir* v. *Anderson*, 10 F. (2d) 813, and held that the gift tax was constitutional. *Anderson* v. *McNeir*, 16 F. (2d) 970. Judge Manton, in his opinion in that case, attempts to distinguish the case of *Pollock* v. *Farmers Loan and Trust Company*, *supra*, and the case of *Dawson* v. *Kentucky Distilleries*, *supra*, on the ground that in those cases the tax fell upon incidents of ownership so essential that it would have been "impossible to use the property at all without incurring the tax". Proceeding further the learned Judge says that "it cannot be successfully contended that the right to give away property exhausts those

interests which together constitute the rights of property, so as to amount to the taking of the property".

The statement of the learned Judge taken at its face value obviously proves too much. A tax, in order to be a property tax, need not encroach upon every essential incident of ownership. In the *Pollock* case a tax which fell upon but a single incident of ownership, namely, the right to receive the rents and profits or income, was held to be a tax upon property, and therefore a direct tax. In the *Kentucky Distilleries* case a tax which fell upon another essential incident of ownership, yet but one, namely, the right to possession, was held to be a tax upon property. It is quite obvious that if an owner of property is deprived of, or grants away, a single incident of ownership, he does not thereby lose or divest himself of the other incidents, no matter how essential the incident which he has lost may be. If he grants away his right to the income, he still retains the right to possess, the right to use, the right to dispose, etc. If he makes a bailment, or a lease for years, granting away his right to possession, he still retains the other incidents of ownership.

Can it be that Judge Manton is attempting to establish a hierarchy among the *fundamental* incidents of ownership? Is the right to the income or the right to possession more important in the eyes of the law, than the right freely to dispose of one's property? The conception of such a gradation of dignity is indeed novel in the light of the authorities cited at pages 21 *et seq.* herein.

We submit that there is no valid distinction between the *Pollock* case and the *Kentucky Distilleries* case, and the instant case. The right of an owner freely to dispose of his property stands upon the same level as the right to income and the right to possession. If a tax which falls upon the right to income or upon the right to possession is a tax on general ownership, and so a direct tax, it must necessarily follow that a tax which falls upon the right of free disposition is also a tax on general ownership, and so a direct tax.

(4)

THE FACT THAT THE ACT PURPORTS TO TAX NOT THE PROPERTY GIVEN BUT THE TRANSFER OF THE PROPERTY DOES NOT THE LESS MAKE THE TAX A DIRECT TAX.

Taxation is an eminently practical matter which touches the humblest of our citizens and does not permit of fine distinctions or metaphysical subtleties. In *Nicol* v. *Ames, supra* (p. 516), it was said:

> "Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical result, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

In the recent case of *Nichols* v. *Coolidge*, decided by the Supreme Court of the United States on May 31, 1927, wherein it was held that Section 402 (c) of the Revenue Act of 1918, in so far as it requires the inclusion in gross estate of the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in enjoyment after his death, is unconstitutional, Justice McReynolds said:

> "Taxes are very real things and statutes imposing them are estimated by practical results."

For all practical purposes the tax in question, whether it may be said to attach to the *right* of transfer or to the transfer as such, is a tax imposed upon and tending to restrict by its levy the disposal of property by way of gift. In making the gift the donor is merely exercising one of his fundamental rights. He is not availing himself of any privilege conferred by Government, such as exists where the title passes from the dead to the living by inheritance or succession, or where a business is being carried on in a corporate capacity, or where

the privilege of using a certain exchange is exercised in making a sale, or where a foreign built yacht is being used for pleasure. In all such instances the tax is either upon some *particular privilege* or some more or less *restricted way of using* the particular object. Here the tax seeks out and imposes a burden directly upon one of the natural and universally recognized rights of ownership in *all* property of *any* kind or variety. The donor in making the gift is acting upon no license; he is merely exercising a right incidental to ownership. He is not holding or using his property pursuant to any Governmental sanction, nor is it necessary for him to secure consent of Government in making the gift.

But it is urged that the wording of the statute must determine to some extent the nature of the tax, and since the tax is "upon the transfer", it is a tax upon a privilege, the privilege of making the gift, likening the tax to a tax upon inheritances and successions.

The fallacy of this argument is at once obvious. In the case of inheritances and successions, a real *privilege* is availed of when the property passes on to the living. No one has the natural right to assign over his property to another by will or inheritance without the consent of the sovereign. Upon death the government might intervene and claim the property of the deceased, for the dead have no rights. If, therefore, as a matter of grace, the state permits such devolution of property, it is by way of granting a privilege, which it may withhold. The so-called "right of succession" being thus in reality a privilege conferred, a tax on succession quite properly is an excise or privilege tax. That this is the theory of the decisions is beyond question. *Knowlton* v. *Moore, supra; United States* v. *Perkins, supra; New York Trust Co.* v. *Eisner*, 265 U. S. 345; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Keeney* v. *New York*, 222 U. S. 525.

The disposal of property *inter vivos* by gift is fundamentally different. Here there is a true *right*, natural to all persons and universally recognized as such in civilized so-

cieties. It does not lie within the power of the sovereign to deny to the owner this right of disposal. The courts and the legislatures of our several states as well as the Federal Government must recognize it, and the Constitution of the United States in the 5th and 14th Amendments fully protects and enforces it. *Buchanan* v. *Warley, supra*, 74; *Powell* v. *Pennsylvania*, 127 U. S. 678, 684; 12 Corpus Juris, p. 945, §459 and cases cited. The power of disposal by way of gift is one of the essential attributes of property inseparably bound up with ownership. Congress no doubt may tax the exercise of such power of disposal, but if it does, no matter what the tax is called, it is a tax on property, and the tax must be apportioned.

For in tax matters it is the substance, not the form, which controls; how the legislature classifies the tax is immaterial. It is the nature of the tax itself which determines its constitutional classification. In considering certain refinements of argument in the *Pollock* cases, the Supreme Court said:

> "But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

Again, the same court in the course of its decision in *Kansas City Ry. Co.* v. *Botkin*, 240 U. S. 227, said (p. 235):

> "Undoubtedly, a tax may be in form a privilege tax, and, yet, in substance, may be a tax on property."

Again, in *Dawson* v. *Kentucky Distilleries Co., supra*, Justice Brandeis said (p. 292):

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents."

The argument that the gift tax is a tax not upon the property given, but upon the dissevered act of transfer seems to

underlie the decision of Judge Raymond sustaining the gift tax in the Court below, and also the decision of Judge Manton sustaining the gift tax in *Anderson* v. *McNeir, supra.* Judge Manton says, at page 973:

> "This gift tax is not imposed because of general ownership of the property, but because of the happening of an event. The transfer of the property by gift gives rise to its levy."

Judge Raymond, in his opinion, concedes that the test is whether or not the particular tax in question is imposed "because of the general ownership of property". He concedes that if the tax fell upon such of the incidents of ownership as "the rights to possess, sell, pledge, keep or enjoy", the tax would be a direct tax, and even concedes that if the tax were upon the *right* to transfer by gift it would be a direct tax. But he maintains the gift tax "is imposed only after the actual transfer", that it is not on the right to transfer but "upon the transfer after the title and ownership of the donor has ceased by reason of a gift." He then continues:

> "Unless this distinction is kept clearly in view, the mind is constantly tempted to revert to the thought that the tax is upon the *right* to transfer by gift. If it were the latter, the tax could only be imposed during actual ownership because the right to transfer terminates by the transfer itself."

He then adds, himself realizing that the attempted distinction is metaphysical to a degree:

> "This distinction is neither technical nor fanciful."

How technical and fanciful is the distinction, a cursory examination will indicate.

Judge Raymond asserts that the tax is not upon the *right* to transfer by gift but upon the transfer itself, that is, as he himself subsequently states in the course of his decision, it is

upon the *exercise* of the right to transfer. Although the act specifically imposes the tax on the donor, he says that the tax is not levied upon any of the incidents of ownership in the hands of the donor, because it is only imposed when the transfer to the donee is complete, and at that time the title and ownership of the donor has ceased.

The very statement of the proposition leaves one considerably confused. The tax is not a tax on the *right* of transfer because it attaches only after the transfer has taken place, and on the consummation of the transfer the right of transfer no longer exists. It is rather upon the *exercise* of the right. But the exercise of the right is likewise lost upon the transfer of the property. At this point the argument has become so refined that it disappears into thin air, leaving the mind in utter confusion! Whether the tax be upon the *act* of transfer or the *right* of transfer or the *exercise* of the right of transfer, as a practical matter the imposition of the tax is a burden upon and directly restricts the exercise of a very fundamental incident of ownership, namely, the very enjoyment of property through its disposal by gift to another.

The learned District Judge seeks aid and comfort for these fine spun distinctions by a reference to certain statements of Chief Justice White in *Billings* v. *U. S.*, *supra*, wherein the learned Chief Justice attempted to make a distinction between the use of property in what he called its purely passive or subjective sense, as distinguished from use in the active or objective sense, that is, in the words of the Chief Justice, "the outward and distinct exercise of a right which ownership confers but which would not necessarily be exerted by the mere fact of ownership."

Grasping this distinction as lending assistance to his own theory, Judge Raymond, after quoting at some length from the opinion, continues:

> "In the present case the subjective or passive right to make a gift of property is not taxed. It is the active or objective exercise of the right which is taxed."

With all due respect, such refinements of thought may well be left to those who are engaged in less practical questions than those of present day taxation. It is hard to conceive of a more "active" or "objective" use of property than the enjoyment of the rents and profits, the very existence of which presupposes some form of objective activity. Yet the *Pollock* cases squarely hold that a tax on such a use is a direct tax.

The distinction between the *Billings* case and the instant case, if the former needs to be distinguished, is well stated by Judge Augustus N. Hand, in *McNeir* v. *Anderson*, 10 F. (2d) 813, 814, wherein it is said:

> "Billings v. United States, 232 U. S. 261, is not in point, for the use of a yacht for pleasure was not only distinguished by the Supreme Court in the opinion of the Chief Justice from the sum total of the rights of disposition and ownership of the yacht, but it may perhaps also be said that many rights in ships have historically been treated as excisable. The laws for registry, clearance and all kinds of regulative provisions appear to place such property peculiarly within governmental control and regulation, so that the subjection of the use of it to an excise tax cannot be regarded as extraordinary."

In holding the Statute here in question unconstitutional, the learned Judge said (p. 814):

> "There is, I believe, no case where such a tax as the one now under consideration has been regarded as a tax upon an exercise or privilege. So far as I can discover, it is a form of taxation new in both America and Europe. Testamentary gifts and gifts in contemplation of death have been both in England and in the United States treated as excises and subjected to taxation upon that theory. If there is anything left of the general views of the court in Pollock v. Farmers Loan & Trust Co., 158 U. S. 601, as to the nature of so called direct taxes, a tax upon a gift not made in contemplation of death and not to take effect upon death would seem to be necessarily

a direct tax imposed upon the donor purely as the owner of property."

This is a clear statement and carries conviction. There is no need here for metaphysical distinctions or nice refinements. Judge Augustus N. Hand continues (p. 815):

> "The tax under consideration seems to have no more warrant than that before the Supreme Court in the recent case of Dawson v. Kentucky Distilleries Co., 255 U. S. 288. There the tax was described as a license tax on persons engaged in the business of owning and storing whiskey in bonded warehouses. The Supreme Court, however, held that the tax was really one on the right to take possession and remove whiskey from a bonded warehouse and was a direct tax upon property and not upon an occupation or license."

No doubt, the Government will endeavor to rely upon such cases as *Billings* v. *United States*, *supra*, *Patton* v. *Brady*, *supra*, and perhaps *Keeney* v. *New York*, *supra*. These cases, it is submitted, are not in point. They are so aptly distinguished by Judge Augustus N. Hand in *McNeir* v. *Anderson*, *supra*, (the full opinion in which is annexed hereto as an appendix) that we do not deem it necessary to do more than refer to that opinion.

Both Judge Raymond in his decision in the Court below and Judge Learned Hand in his concurring opinion in the *McNeir* case in the Circuit Court of Appeals for the Second Circuit, endeavored to fortify the position taken on the ground that the gift tax was enacted as a corollary of the estate tax and in order to insure its efficacy.

"The object of the gift tax", said Judge Raymond, "undoubtedly was to make effective the provisions of the income tax and the estate tax on their application to large estates." Later in the course of his decision he says that the gift tax "is merely corollary to the estate tax imposed in Part I of Title III of the Revenue Act of 1924 • • •. Because it was

regarded by Congress as being essential to preserve the efficacy of the estate tax it was sometimes referred to as the 'mother' of that tax", and "Its substantial object was to prevent the widespread evasion of the estate tax and high surtaxes of the income tax law." He then proceeds "Would not Congress have the right to say, in view of the history of evasion connected with the estate tax, that gifts of more than $50,000 in any one year shall be conclusively presumed to be made with an attempt to evade the estate tax and to impose an excise tax thereon?"

In passing, it should be noted that whatever the purpose of Congress in enacting the gift tax in 1924, at the present time Congress does not consider such a tax necessary for the effective administration of the Federal Estate Tax, for the gift tax was repealed by the new Revenue Act of 1926 as of January 1, 1926, while the Federal Estate Tax was continued as before.

But even assuming that the gift tax was enacted as a necessary corollary of the Federal Estate Tax, its constitutionality is not assured for that reason. Justice Holmes said in his dissenting opinion in *Schlesinger* v. *Wisconsin*, 270 U. S. 230, 241:

> "The law allows a penumbra to be embraced that goes beyond the outline of its object in order that the object may be secured."

Be that as it may, the majority of this Court in that very case refused to sustain a taxing act which overstepped the power of the State Legislature although vigorously defended on the ground that the law was necessary in order to make effective a tax which it lay within the power of the Legislature to impose.

In the *Schlesinger* case it appeared that the Wisconsin Estate Tax Law imposed an estate tax upon gifts made in contemplation of death and the presumption of intention was made conclusive if the gift was made within six years of the

death, although there was no relation between the gift and the death in point of fact. This provision of the Wisconsin Statute this Court held unconstitutional. Contention was made that such a conclusive presumption was necessary to prevent evasion of the estate tax. This Court in considering and rejecting such a contention said in part (p. 240):

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. * * * Rights guaranteed by the Federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

And in the more recent case of *Nichols* v. *Coolidge*, No. 88, decided May 31, 1927, Justice McReynolds said:

> "But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them."

The same reasoning is applicable here. While Congress has the power to levy a tax upon the privilege of succession, it cannot in an effort to make that tax more efficacious, reach beyond its power and impose, without apportionment, a tax which falls upon the general ownership of property. An attempt by Congress to impose a direct tax, without apportionment, cannot be justified by the assertion that the tax is being imposed in order to aid in the effective administration of an indirect tax.

In answer to those who regard the question as involving a difference in degree rather than in kind, it is enough to say that the gift tax is even more remote in its relation to the tax on the transfer of property by death than were the provisions before the Court in the *Schlesinger* case and in the *Coolidge* case.

(5)

A GIFT TAX IS NOVEL TO ENGLISH AND AMERICAN JURISPRUDENCE. IT WAS FOR THE FIRST TIME MADE A PART OF THE FISCAL SYSTEM OF ANY NATION IN 1924. IT WAS ENTIRELY UNKNOWN TO LEGISLATORS OR ECONOMISTS AT THE TIME THE CONSTITUTION WAS ADOPTED.

When in 1787 the Constitution was formally adopted by its framers, not only was a tax on gifts of property not known but it was entirely beyond conception that such a tax would ever be imposed. A tax of this nature was totally foreign to the common law. Taxes on the use of private carriages, taxes on tobacco and spirituous liquors and on occupations or privileges of many kinds had been recognized and accepted as excises for many years. But it is safe to say that neither the legislators nor the economists of those days, even in their urgent need to raise revenue for the depleted coffers of the new Government, ever thought of imposing a tax on all gifts made by its citizens. Surely this condition of affairs at the time the Constitution was passed bears directly upon its interpretation. Justice Holmes in the opinion in *New York Trust Co. v. Eisner*, 256 U. S. 345, 349, recognized that the question of taxation is largely historical. With respect to the attempted distinction between the tax on the privilege of transmitting and the tax on the privilege of receiving, he said:

> "But that matter also is disposed of by *Knowlton v. Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy'. 178 U. S. 81-83."

And then he added this peculiarly pertinent observation:

> "Upon this point a page of history is worth a volume of logic."

The instant case may well be disposed of on this simple yet fundamental principle. Not only was a gift tax never conceived at the time of the Constitution was adopted, but no one ever thought of levying such a tax until a few months prior to the passage of the Revenue Act of 1924. This fact alone is sufficient to make a court pause before holding constitutional such a novel invention. Judge Angustus Hand in deciding the *McNeir* case largely rested his decision upon this historical background, for after indicating that the tax in question clearly is a tax on property within the rule laid down in the *Pollock* case and the *Kentucky Distilleries* case, and after quoting from Justice Holmes' statement in *New York Trust Co.* v. *Eisner*, *supra*, he concluded his opinion with the following language:

> "The fact is that there is no 'page of history' or even a line of history where such a tax as this has been ever foreshadowed, and if the reasoning of *Pollock* v. *Farmers Loan & Trust Co.*, *supra*, is to stand, I cannot see how this tax can be defended, which would not seem to be an excise or license tax for the privilege of doing something, but a tax upon a necessary incident of the ownership of property, which has not been apportioned, and is therefore, forbidden by Article I, Section 2, Clause 3, of the Federal Constitution. The classification of subjects of taxation is not scientific but largely historical, and a tax upon an ordinary transfer of personal property *inter vivos* unconnected with the conduct of any business would seem to be a direct tax, if anything can be, under definitions that have been generally accepted. See *Pollock* v. *Farmers Loan & Trust Co.*, *supra*, *Nicol* v. *Ames*, 173 U. S. 509, and *Dawson* v. *Kentucky Distilleries Co.*, *supra*."

III.

If the gift tax is an indirect tax when applied prospectively, its retroactive application results in taxing property directly, and since not apportioned it is unconstitutional as applied retroactively.

In the instant case a substantial part of the gifts were made prior to the enactment of the law on June 2, 1924, and after January 1, 1924. This fact is of course unimportant if the Act imposing the tax is held unconstitutional on account of the nature of the tax. But even if the gift tax could be considered an excise tax when applied prospectively, so far as levied or attempted to be levied on gifts made before June 2, 1924, it is a direct tax as to such gifts and, since not apportioned, it is unconstitutional.

We only mention this point to raise it, and do not propose to argue it at length. The very nature of an excise or indirect tax forbids its retroactive operation without apportionment. To impose a tax upon the privilege of making a transfer after the transfer is completed leaves no choice by the taxpayer as to whether he will or will not exercise the privilege, and renders the tax unavoidable. It thereby loses one of the essential characteristics of an indirect or excise tax and in fact becomes a direct levy either upon the property itself because of ownership, or upon the person of the donor.

At the time the event occurred which subsequently occasioned the tax, no statute imposing the tax was in force. The privilege of transfer (if it was a privilege), had been exercised, and the gift completed without the exaction of a toll in the form of a tax. Now, long after the event, a tax is levied on the past act of transfer. Such a tax is the antithesis of an excise or privilege tax. It is a direct tax imposed upon the donor solely by reason of his previous ownership of the property, and since unapportioned, its levy and collection is

unconstitutional. It should be remembered that the tax in *Nichols* v. *Coolidge, supra,* was held invalid as an excise because, in the words of Justice McReynolds, "the amount is made to depend upon past lawful transactions, not testamentary in character and beyond recall."

Conclusion.

In conclusion, it is respectfully submitted that the provisions of Title III, Part II, of the Revenue Act of 1924, are unconstitutional as applied both prospectively and retrospectively.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Claimant,
Office & Post Office Address,
15 Broad Street,
Borough of Manhattan,
New York, N. Y.

JOHN W. DAVIS,
MONTGOMERY B. ANGELL,
BLOUNT RALLS,
Of Counsel.

APPENDIX.

McNeir v. Anderson, Collector,*

(U. S. District Court, Southern District of New York, decided Feb. 15, 1926)

Statement of Facts.

On the 8th day of January, 1924, the plaintiff, George McNeir, hereinafter called the Donor, executed a deed of trust to the Farmers Loan & Trust Company providing that they should hold certain securities in trust to divide the same into three equal parts and to collect and to receive the income thereof and to apply the same one part to the use of the Donor's wife during the term of her natural life, another part to the use of Burrows McNeir, a son of the Donor, during the term of his natural life, and the third part to the use of Thomas Shepard McNeir, a son of the Donor during the term of his natural life. There were further trusts created for the grandchildren of the Donor, and, if the wife and the sons of the Donor should die before him leaving no issue, the trust deed provided for the payment over to the principal to the Donor, if then living, and, if not then living, one-half to Georgetown University, and the other half to those persons who would be entitled to receive the same if the Donor had died possessed of the personal property a resident of the State of New York and intestate. The securities embraced in the deed of trust were of the value of $806,400, and were transferred to the trustee on January 8, 1924. On December 15, 16 and 22, 1924, the Donor made certain other gifts to his children Burrows and Thomas Shepard McNeir, and to one William McNeir, of the value altogether of $4,300. On January 22, 1925, he executed a return for Federal Gift Tax and paid under protest a gift tax as assessed amounting to $47,

*This decision was reversed by the Circuit Court of Appeals, Second Circuit, in *Anderson* v. *McNeir*, 16 F. (2d) 970. The opinions of Judge Manton and Judge Learned Hand are discussed in the brief proper.

284. A refunding claim was rejected and thereafter this action to recover the tax was brought in this court February 7, 1925. The defendant thereafter moved to dismiss the complaint which set forth the above facts upon the ground that it did not contain facts sufficient to constitute a cause of action.

Opinion.

Augustus N. Hand, District Judge:—

The gift tax was imposed under Section 319 of the Revenue Act of 1924, which provides that:

> "For the calendar year 1924, and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated whether made directly or indirectly and upon the transfer by a non-resident by gift during such calendar year of any property situated within the United States whether made directly or indirectly * * *."

I shall not discuss whether the gift tax is unconstitutional or inapplicable because applied retroactively or because not uniform throughout the United States, or because the classification is unreasonable. If the tax be held a direct tax which must be apportioned among the several States, as I believe it must be, it will be unnecessary to consider the other objections which the plaintiff has raised.

There is, I believe, no case where such a tax as the one now under consideration has been regarded as a tax upon an excise or privilege. So far as I can discover, it is a form of taxation new in both America and Europe. Testamentary gifts and gifts in contemplation of death have been both in England and in the United States treated as excises and subjected to taxation upon that theory. If there is anything left of the general views of the court in Pollock v. Farmers Loan & Trust Company, 158 U. S. 601, as to the nature of so-called direct

taxes, the tax upon a gift not made in contemplation of death and not to take effect upon death would seem to be necessarily a direct tax imposed upon the Donor purely as the owner of property. Billings v. United States, 232 U. S. 261, is not in point, for the use of a yacht for pleasure *was* not only distinguished by the Supreme Court in the opinion of the Chief Justice from the sum total of the rights of disposition and ownership of the yacht, but it may perhaps also be said that many rights in ships have historically been treated as excisable. The laws for registry, clearance and all kinds of regulative provisions appear to place such property peculiarly within governmental control and regulation so that the subjection of the use of it to an excise tax cannot be regarded as extraordinary. The case of Patton v. Brady, 184 U. S. 608 is also not in point. There there was a tax upon tobacco manufactured for consumption imposed at a period intermediate the commencement of manufacture and the final consumption of the article. Such a tax had been applied to tobacco in England prior to the adoption of the Constitution and was held by the Supreme Court to have come within the definition of an excise tax.

The Government cites the language of Mr. Justice Lamar in Keeney v. New York, 222 U. S. 525, where a statute of New York providing for a transfer tax upon property passing by deed of a resident and intended to take effect in possession or enjoyment at or after death of the grantor is discussed. In that case the testatrix, Mrs. Keeney, four years before her death had conveyed certain property to trustees in trust to divide the net income between herself and her three children during the term of her life, and upon her death to transfer the principal to her children, or their issue. The argument was made that the case was different from one where property was transferred in contemplation of death because there was no such contemplation that a gift made inter vivos to take effect upon death was not within the transfers which could be taxed by the State as a privilege and that the tax

therefore was subject to the ordinary limitations of a property tax. Mr. Justice Lamar in upholding the tax said:

> "But, if any such distinction could be made between taxing a right and taxing a privilege, it would not avail plaintiffs in the present case. There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes. Some statutes go further than that of New York, and tax gratuitous acquisitions under marriage settlements, trust conveyances, or other instruments where the transfer of property takes effect upon the death, not merely of the grantor, but of any person whomsoever."

He went on to say that the Internal Revenue Act of 1864

> "imposed a succession tax on 'all dispositions of real estate, taking effect upon the death of any person'".

and cited the case of Scholey v. Rew, 23 Wall. 331, at p. 347. This remark about the effect of the Internal Revenue Act of 1864, and the suggestion that it extended to transfers inter vivos to take effect on the death of persons other than the grantor was made in arguendo and was unnecessary to the disposition of the Kenney case. Certainly the case of Scholey v. Rew, supra, involved no such interpretation, but whether or not such can be regarded as the proper construction of the Internal Revenue Act of 1864, there may well be a difference in classification between a tax upon a transfer of property upon the death of a person, whether he be the grantor or a third person, and the taxing of a gift inter vivos at a time when it is entirely unconnected with any devolution of property by death.

The question involved in the present case does not resemble that considered in the Keeney case for there the tax was upon the transfer of an estate at the time of the death of the settlor which had been held in trust for her life use. Here it is imposed upon a transfer inter vivos and not upon a transfer at the time of the death of anyone.

The tax under consideration seems to have no more warrant than that before the Supreme Court in the recent case of Dawson v. Kentucky Distilleries, 255 U. S. 288. There the tax was described as a license tax of persons engaged in the business of owning and storing whiskey in bonded warehouses. The Supreme Court, however, held that the tax was really one on the right to take possession and remove whiskey from a bonded warehouse and was a direct tax upon property and not upon an occupation or license. Mr. Justice Brandeis said in the opinion:

> "To levy a tax by reason of ownership of property is to tax the property. * * * It cannot be made an occupation or license tax by calling it so."

In New York Trust Company v. Eisner, 256 U. S. at p. 349, Mr. Justice Holmes mentioned the argument that the Federal Estate tax if treated as levied upon the transfer of the decedent's estate on his death would be direct, and therefore void for want of appointment and said:

> "But that matter * * * is disposed of by Knowlton v. Moore, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty of excise, because of the particular occasion which gives rise to its levy.' 178 U. S. 81 83. Upon this point a page of history is worth a volume of logic."

The fact is that there is no "page of history" or even line of history where such a tax as this has been ever foreshad

owed, and if the reasoning of Pollock v. Farmers Loan & Trust Co., supra, is to stand, I cannot see how this tax can be defended which would not seem to be an excise or license tax for the privilege of doing something, but a tax upon a necessary incident of the ownership of property which has not been apportioned and is, therefore, forbidden by Article 1, Section 2, Clause 3, of the Federal Constitution. The classification of subjects of taxation is not scientific but largely historical, and a tax upon an ordinary transfer of personal property inter vivos unconnected with the conduct of any business would seem to be a direct tax, if anything can be, under definitions that have been generally accepted. See Pollock v. Farmers' Loan & Trust Company, supra; Nicol v. Ames, 173 U. S. 509, and Dawson v. Kentucky Distilleries, supra.

The motion by the collector to dismiss the complaint is accordingly denied.

OCT 3 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 154. October Term, 1927.

JOHN W. SLODGETT,
Plaintiff-in-error,

v.

CHARLES HOLDEN, Collector of Internal Revenue,
Defendant-in-error.

ERROR TO THE DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN.

Brief of Amici Curiae Sur Questions Certified.

IRA JEWELL WILLIAMS,
NATHAN GLICKSMAN,
LOUIS QUARLES,
Amici curiae.

IRA JEWELL WILLIAMS, JR.,
BROWN & WILLIAMS,
GLICKSMAN & GOLD,
LEVIN, SPOONER AND QUARLES,
Of Counsel.

International, 30 Church St., Philadelphia

INDEX TO ARGUMENT.

I. THE TAX IS INAPPLICABLE TO PAST GIFTS.

Page

A tax on gifts "for the year 1924" applies in future only 1

Other sections of act unequivocally show retrospective intent, lacking as to gift taxes 2

Isolated, fully consummated transaction should not be retrospectively taxed 2

Previously acquired life membership not taxed 2

Here no continuing "privilege" but isolated transaction wholly consummated in the past 2

II. IF APPLIED TO PAST GIFTS THE TAX WOULD BE UNCONSTITUTIONAL.

A past and fully completed transaction cannot be made excisable *nunc pro tunc* 3

Any such so-called excise is in reality a direct tax 3

An attempted tax on an irrevocable trust previously created was held unconstitutional. In *Knox v. Bowers*, 12 F. (2d) 625 [illegible] the name is merely false, there is no excise, and the exaction falls into the category of unapportioned direct taxes 4

The value of properties previously transferred may not be included in the taxable gross estate. *Nichols v. Coolidge* 5

III. THE TAX IS ARBITRARY AND UNREASONABLE BECAUSE GRADUATED AND OTHERWISE LACKING IN UNIFORMITY.

Graduated from one to forty per cent on gifts of $50,000 and exceeding $10,000,000 respectively 6

Graduated taxes could not properly be laid on all gifts or, indeed upon any gift without testamentary character. *Schlesinger v. Wisconsin*, 270 U. S. 230, 240 6

INDEX TO ARGUMENT—Continued.

Page

The act arbitrarily discriminates between resident and non-resident citizens ... 7

The act makes an arbitrary and unreasonable discrimination based upon the amount of individual gifts—Size exempt ... 7

IV. A TAX ON GIVING IS A TAX ON PROPERTY, BEING A TAX ON AN ESSENTIAL ATTRIBUTE OF PROPERTY

Property the sum of its essential attributes ... 7

All its incidents are necessary to its existence ... 8

Deprivation of a single incident of property is deprivation of property ... 8

Any substantial interference with the enjoyment of land is a taking ... 8

Uncompensated interference with the right of enjoyment and right of disposal may be confiscation ... 8

Deprivation of an essential attribute of property is deprivation of property ... 9

A tax on an essential incident is a tax on property ... 9

Liberty includes the right of disposal of property ... 9

This an essential liberty guaranteed by the fourteenth amendment ... 9

The constitution protects this essential attribute of property ... 10

There are rights of property so basic as to be a part of property itself and a tax thereon is a tax on property ... 10

A tax on income is a direct tax ... 10

A tax on the right to remove whiskey from a bonded warehouse is a direct tax ... 10

A tax upon every sale made in any place is really and practically upon property. [illegible] ... 10

Indirect taxes are taxes on privileges, e. g. (a) inheritance taxes and (b) business taxes ... 11

INDEX TO ARGUMENT—Continued.

V. THE RIGHTS TO GIVE IS NOT A PRIVILEGE TAXABLE BY CONGRESS.

	Page
The gift tax is not an inheritance tax	11
Certain typical business taxes noted	11
Fundamental distinction: to give is to exercise an ordinary and indispensable right inherent in property itself	12

CASES.

	Page
Billings v. United States, 232 U. S. 261 (1914)	5
Buchanan v. Warley, 245 U. S. 60 (1917)	9
Dawson v. Kentucky Distilleries Company, 255 U. S. 288 (1921)	10
Flint v. Stone Tracy Company, 220 U. S. 107 (1911)	5, 12
Frew v. Bowers, 12 F. (2d) 625 (1926)	4
Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, 320 (1874)	7
LeFebre v. Wilkinson, Par. 7033, Vol. III, Commerce Clearing House, Unabridged Federal Tax Service, 1927	3
Lewellyn v. Frick, 268 U. S. 238 (1925)	4
McCray v. United States, 195 U. S. 27 (1904)	12
Nichols v. Coolidge (May 21st, 1927, McReynolds, J.)	5
Nicol v. Ames, 173 U. S. 509, 521 (1898)	10, 11
Nunnemacher v. Wilkinson, Par. 7033, Vol. III, Commerce Clearing House, Unabridged Federal Tax Service, 1927	3
Pacific Insurance Company v. Soule, 7 Wallace 433 (1868)	11
Patton v. Brady, 184 U. S. 608 (1902)	11
Peabody v. United States, 231 U. S. 530, 538 (1913)	8
People v. Otis, 90 N. Y. 48, 52 (1882)	9
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429 (1895); 158 U. S. 601 (1895)	10
Portsmouth Harbor Land & Hotel Co. v. U. S., 260 U. S. 327 (1922)	8
Powell v. Pennsylvania, 127 U. S. 678, 684 (1888)	9
Schlesinger v. Wisconsin, 270 U. S. 230 (1925)	6
Shwab v. Doyle, 258 U. S. 529, 534 (1922)	2, 11
Spreckles Sugar Ref. Company v. McClain, 192 U. S. 397 (1904)	12
Thomas v. U. S., 192 U. S. 363 (1904)	11
Treat v. White, 181 U. S. 264 (1901)	11
U. S. v. Heth, 3 Cranch 399, 413 (1806)	2
Veazie Bank v. Fenno, 8 Wallace 533 (1869)	11
Williams v. McCaughn, 17 Fed. (2) 891 (1926)	2
Wynehamer v. People, 13 N. Y. 378, 398 (1856)	8

ACTS CITED.

	Page
Act of 1924, Sec. 302 (h)	3

QUOTATIONS.

Kent's Commentaries, Part V, p. 320	9

IN THE

Supreme Court of the United States.

No. 154. October Term, 1927.

JOHN W. BLODGETT,
Plaintiff-in-Error,

v.

CHARLES HOLDEN,
Collector of Internal Revenue,
Defendant-in-Error.

Error to the District Court for the Western District of Michigan.

BRIEF OF AMICI CURIAE SUR QUESTIONS CERTIFIED.

I. THE TAX IS INAPPLICABLE TO PAST GIFTS.

Section 319 of the Revenue Act of 1924, 43 Stat. 313, reads as follows: "For the year 1924 . . a tax . . . . is hereby imposed upon the transfer by a resident by gift during such calendar year of any property." The Act does not say "whether such transfer be made before or after the passage of this Act." The immediate question is whether the quoted tax applies to gifts consummated before the passage of the Act.

Statutes, and especially taxing statutes, are not to be construed retroactively if such a construction can reasonably be avoided. Thus, in *Leaellyn* v. *Frick*, 268 U. S. 238 (1925), the Government urged that the Revenue Act of 1919 included the value of insurance "under policies taken out by the decedent upon his own life," including policies taken out prior to the taxing Act. This court held that the Act did not apply to the avails of policies taken out before the passage of the Act. Mr. Justice Holmes said, at page 251,

> "Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

Again, "Laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared": *Shaub* v. *Doyle*, 258 U. S. 529, 534 (1922).

"Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them": *U. S.* v. *Heth*, 3 Cranch 399, 413 (1806).

In *Williams* v. *McCaughn*, 17 Fed (2d) 295 (1926) U. S. D. C. E. D. Pa., Dickinson, *J.*, it was held that a tax on life memberships did not apply to life memberships purchased prior to the passage of the taxing Act.

There is nothing to show an actual intent on the part of Congress to tax gifts completed before the Act

was passed. On the contrary, when Congress desired to tax transactions completed before the Act, it said so in no uncertain terms:

> "Subdivisions (b), (c), (d), (e), (f) and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act."
>
> (Act of 1924, Sec. 302 (h).)

No such language is used as to gifts.

II. IF APPLIED TO PAST GIFTS THE TAX WOULD BE UNCONSTITUTIONAL.

It is beyond question that if the Act in question is to be applied retroactively, the result will be to tax the exercise of a power and right which was completed before the passage of the Act. This is exactly the same as saying, "You must pay ten dollars now because you walked across Sixteenth Street yesterday, although yesterday Sixteenth Street was free to all."

Such a tax is unconstitutional.

In *Nunnemacher* v. *Wilkinson* and *Le Febre* v. *Wilkinson*, par. 7033, Vol III, Commerce Clearing House, Unabridged Federal Tax Service, 1927, in giving judgment for the defendant, Judge Geiger said in part:

> ". . . the whole proposition comes down to the single direct statement; can an excise tax be effective other than *in future?* . . ."
>
> ". . . It seems absurd to say that the Nunnemacher and Le Feber donors should be told on June 2, 1924, that they are now subject to an

> excise upon an act wholly beyond their power to revoke, recall, or do a thing in respect of what they had previously done; and how then can you escape the idea, although it is called an excise, that it is nothing more or less than a direct tax, either against their property or against them, in respect of a completed transaction, which, if I might put it that way, at the time Congress passed the law was no longer, as to them, *excisable?*"

Again, in *Frew* v. *Bowers*, 12 F. (2d) 625 (1926), a settlor created an irrevocable trust before the enactment of the taxing statute and twelve years before his death. The United States attempted to levy a tax upon this, on the ground that it was a transfer "intended to take effect in possession or enjoyment at or after his death," because he had received the income for life. The Circuit Court of Appeals (2d Circuit) held, in an opinion by Hough, *C. J.*, that the tax so imposed was unconstitutional. The Court said, on p. 628:

> "In this case the effort is to tax in 1922 in respect of something untaxable in 1910. Cf. *Lewellyn* v. *Frick*, 268 U. S. 238, at 251. If it be said that Congress might have taxed the 1910 transfer, and therefore can tax it even in 1922, the answer is that nothing of the kind has been attempted. There is no tax now laid on the transfer of 1910, nor the property transferred. Could Congress in 1922 have laid a tax on Mr. Nash because he gave away $200,000 in 1910? *If that be assumed as possible, it is not possible that the tax so laid*, and computed on the gift, its credits and gains, *could ever be an excise on the transfer. But if the tax be laid as it actually has been, and called an excise, on the transfer of something else, the name is merely false, there is no excise, and the exaction falls into the category of unapportioned direct taxes.* We think this an effort to use a constitutional power as a hook on which to hang a cloak that conceals unconstitutional action. There

> is no real difference between disguising this direct tax under the name of a duty, and laying a tax in order generally to regulate some subject taxable, but not otherwise subject to national regulation. The real purpose is dealt with, notwithstanding the cloak. The Child Labor Cases, 259 U. S. 20, is the leading example."

In the foregoing case the Government stipulated that the writ of error to that Court might be dismissed in view of the decision of this Court in *Nichols* v. *Coolidge* (May 21st, 1927, McReynolds, *J.*), holding invalid Section 402 (c) of the Act of February 24, 1919 in so far as it requires that there shall be included in gross estate the value of properties transferred by a decedent prior to its passage.

It may be contended that the cases of *Flint* v. *Stone Tracy Company*, 220 U. S. 107 (1911) and *Billings* v. *United States*, 232 U. S. 261 (1914) are contrary to the principles just set forth. But in each case the tax was upon a *continuing* act (in the *Flint* case, upon the privilege of doing business in corporate form, and in the *Billings* case, upon the use of foreign built yachts), and was imposed annually, without pro rating as to time. *In each case also the tax as imposed operated in future*, because it applied to a state of facts continuing in existence after it was passed. Of course, the lumping charge *per annum* in those cases was unfair. But that fact is no precedent in favor of the tax now in issue, because the principle of those cases cannot be extended to uphold an "excise" upon a single consummated past transaction.

If the Government cannot by arbitrary fiat say that that which has been a part of an estate remains as a part of the estate for taxation purposes, *a fortiori*, the Government cannot by arbitrary fiat bring back the past and make "excisable" water which has long since gone over the dam.

It is wholly unreasonable, arbitrary and subversive of liberty to impose *nunc pro tunc* a graduated tax on completed acts of generosity not taxable when they were performed. All retroactive laws are abhorrent. No past "transaction" should be excisable. It is not the act of a free government, but an act of tyranny, to ordain that a right free when exercised must bear a retroactive burden.

III. THE TAX IS ARBITRARY AND UNREASONABLE BECAUSE GRADUATED AND OTHERWISE LACKING IN UNIFORMITY.

The tax imposed by the Act varies from "1 per centum of the amount of taxable gifts not in excess of $50,000" to "40 per centum of the amount by which the taxable gifts exceed $10,000,000" (Section 319). It is, then, a graduated tax. Such a tax is unconstitutional.

The State of Wisconsin imposed a graduated tax upon inheritances, including all transfers *mortis causa*. The Act provided that transfers within six years of the transferor's death were to be conclusively presumed to have been made in contemplation of death. This Court held the Statute unconstitutional: *Schlesinger* v. *Wisconsin*, 270 U. S. 230 (1926), McReynolds, *J.*, saying on p. 240:

> "Gifts *inter vivos* within six years of death, but in fact made without contemplation thereof, are first conclusively presumed to have been so made without regard to actualities, while like gifts at other times are not thus treated. There is no adequate basis for this distinction. Secondly, They Are Subjected to Graduated Taxes Which Could Not Properly Be Laid on All Gifts or, Indeed, Upon Any Gift Without Testamentary Character."

It is significant that Mr. Justice Holmes, though dissenting, said nothing on the subject of graduated taxes which conflicts with that statement in the opinion of the Court.

Moreover the Act discriminates between residents and non residents. A resident citizen is allowed a general exemption of $50,000. No such exemption is allowed to a non resident. (Section 321.) This is purely arbitrary. On the other hand there is a discrimination against the resident citizen. He is taxed on all transfers of "property wherever situated," while the non-resident citizen is taxed only on transfers of "property situated *within the United States.*" (Sec. 319.) Thus an American citizen, resident in Europe, may remove all his personal property and give it away and avoid the gift tax; but a resident citizen cannot do this. A resident citizen must pay a gift tax on his transfer of French real estate; a non-resident need not.

In addition the tax makes an arbitrary discrimination based upon the amount of individual gifts. "Gifts the aggregate amount of which to any one person does not exceed $500" per annum are exempt. $51,000 may be equally divided between 102 people without tax. If divided equally amongst 101 persons, the donor is taxable. The foregoing would seem to be not only unreasonable but reasonless.

IV. A TAX ON GIVING IS A TAX ON PROPERTY.

Property in a thing is the sum of the rights, privileges, powers and immunities which the owner of the thing lawfully enjoys in respect to it. Property is the sum of its essential attributes. In

> *Grand Rapids Booming Company* v. *Jarvis*, 30 Mich. 308, 320 (1874), it was said:

> "Of what does property practically consist but of the incidents which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to the lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of' "?

And all the incidents of property are necessary to its existence; Take away a single one and what is left is no longer property. As the Court of Appeals of New York said in

> *Wynehamer* v. *People*, 13 N. Y. 378, 398 (1856):
>
> "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation."

The attributes of property need not all be taken; it is enough if *one* be taken:

> *Portsmouth Harbor Land & Hotel Co.* v. *U. S.*, 260 U. S. 327 (1922);
> *Peabody* v. *U. S.*, 231 U. S. 530, 538 (1913).

Shooting over land

In New York it is held that the erection of an elevated railway was a substantial diminution of the property rights of the adjoining owners, for which they were entitled to compensation in eminent domain proceedings:

> *Caro* v. *Metropolitan Elevated Railway Co.*, 46 Super. Ct. (14 J. & S.) 138 (1880);
> *Story* v. *New York Elevated R. R. Co.*, 90 N. Y. 122 (1882).

Mexico has recently adopted laws requiring foreign owners of petroleum rights to apply for concessions; but these concessions may not be granted except to Mexicans, or to Mexican companies owned 51 per cent. by Mexicans. The State Department has protested, *inter alia*, because of the deprivation of property involved in limiting the right of disposition to Mexican buyers. International law protects not merely the fee, but the right of enjoyment, including the right of disposition.

Or as was said in

People v. *Otis*, 90 N. Y. 48, 52 (1882):

> "*Depriving an owner of property of one of its essential attributes, is depriving him of his property.*"

And Chancellor Kent says (Commentaries, Part V, p. 320):

> "The exclusive right of using and transferring property follows as a natural consequence of the perception and admission of the right itself."

This Court recognizes these rights of property. It said, in *Powell* v. *Pennsylvania*, 127 U. S. 678, 684 (1887):

> "The main proposition advanced by defendant is that his enjoyment, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The Court accedes to this general proposition as embodying a sound principle of constitutional law."

And in *Buchanan* v. *Warley*, 245 U. S. 60 (1917), the Court said, at page 74:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use and dispose of it. The Constitution protects these essential attributes of property."

Certain rights of property are so fundamental that their sum constitutes property itself. A tax on the exercise of any one of them is a direct tax upon property:

> *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601 (1895).

Since a tax upon the right to receive the income of a property is a direct tax, *a fortiori* a tax upon the right to dispose of property by gift is a direct tax; the right to give property away is even more intimately wrapped up with the nature of property itself than the right to receive the income of property.

Again, in *Dawson v. Kentucky Distilleries Company*, 255 U. S. 288 (1921), this Supreme Court held that a man has the right to take possession of his property, holding that a tax on the right to remove whiskey from a bonded warehouse, where it was required by law to be placed, was a direct tax.

In *Nicol v. Ames*, 173 U. S. 509, 521 (1898), Mr. Justice Peckham said:

> "A tax upon every sale made in any place . . . is really and practically upon property."

While this was said by way of dictum, it is a very positive statement that an owner of property has a right to sell.

V. THE RIGHT TO GIVE IS NOT A PRIVILEGE TAXABLE BY CONGRESS.

All indirect taxes are taxes on privileges of one kind or another. Broadly speaking, they fall into two classes: (a) *inheritance taxes*, used as a generic term to include inheritance taxes proper, legacy taxes and estate taxes; (b) *business taxes*.

(a) The gift tax is not within the former. It applies generally. There are special provisions directly applicable to gifts *mortis causa*: *Shwab* v. *Doyle*, 258 U. S. 529 (1922).

(b) As typical examples of business taxes may be noted taxes:

1. On the privilege of engaging in the insurance business (measured by gross receipts): *Pacific Ins. Co.* v. *Soule*, 7 Wallace 433 (1868).

2. On the privilege of a state bank to issue bank notes for use as currency: *Veazie Bank* v. *Fenno*, 8 Wallace 523 (1869).

3. On the privilege of doing business at "exchanges"—a war tax: *Nicol* v. *Ames*, 173 U. S. 509 (1899).

4. On the privilege of selling "calls" for stock: *Treat* v. *White*, 181 U. S. 264 (1901).

5. On the privilege of selling tobacco: *Patton* v. *Brady*, 184 U. S. 608 (1902).

6. On the privilege of disposing of property in the form of certificates (of stock): *Thomas* v. *U. S.*, 192 U. S. 363 (1904).

7. On the privilege of engaging in the sugar refining business: *Spreckles Sugar Ref. Co.* v. *McClain*, 192 U. S. 395 (1904).

8. On the privilege of engaging in the business of making oleomargarine: *McCray* v. *U. S.*, 195 U. S. 27 (1904).

9. On the privilege of doing business in the form of a corporation: *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911).

The distinction between these and all other privilege taxes is obvious. To give is to exercise an ordinary and indispensable right inherent in property itself. The right to regulate and tax the transmission of property by death is wholly different. The right to regulate and tax business is also wholly different.

CONCLUSION.

"Logic and taxation are not always bedfellows." But should not the rule of reason apply in enforcing constitutional limitations upon the power of government? And should not this rule apply even in a tax case?

It was of the essence of the original compact that the Congress should have no power to levy a direct tax without apportionment. From the point of view of common sense and substance the Congress has violated the compact. If generosity is to be taxed at all, the power is one reserved exclusively to the States. Some subject matters of taxation besides land should be within the exclusive jurisdiction of the States.

The conflicts in our dual government, unless correctly resolved, will breed untold hardship and expense. Thus, the decision in *Maxwell* v. *Bugbee*, 250

U. S. 525 (1919), (from which Mr. Justice Holmes, Mr. Justice Van Devanter, Mr. Justice McReynolds and the late Chief Justice dissented), that State A may tax the estate of a decedent elsewhere domiciled merely because a part of the estate is invested in the stock of a corporation of State A, has had far reaching and disastrous consequences.

Property is of the essence of civilization; the power to give is of the essence of property; whatever takes away or taxes that right to give is a direct burden upon property qua property. The gift tax is a direct tax.

IRA JEWELL WILLIAMS,
NATHAN GLICKSMAN,
LOUIS QUARLES,
Amici Curiæ.

Ira Jewell Williams, Jr.,
Brown & Williams,
Glicksman & Gold,
Lines, Spooner & Quarles,
Of Counsel.

...reme Court of the United States

OCTOBER TERM, 1926.

Docket No. [redacted] 154

JOHN W. BLODGETT,
Plaintiff-in-Error,
against

...ARLES HOLDEN, as Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

...TIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

...EF OF C. ALEXANDER CAFFEY AND RUSSELL L. ...RADFORD AS AMICI CURIAE AND ON BEHALF OF GEORGE McNEIR.

C. ALEXANDER CAFFEY,
RUSSELL L. BRADFORD,
Amici Curiae.

POINTS OF ARGUMENT.

PAGE

FACTS 2

POINT I. Properly construed the gift tax levied by Part II of Title 3 of the Revenue Act of 1924 is not retroactive 4

POINT II. If the statute is construed to apply to gifts which were completed prior to the enactment of the statute, it is unconstitutional 9

A. The imposition of a tax upon persons by reason of gifts made by them prior to the effective date of the Act is not taxation but an arbitrary exaction and a taking of property in violation of the Fifth Amendment 14

B. If the statute be construed to have retrospective application, it is a direct tax 19

This Court, so far as we have been able to ascertain, has never yet upheld a retroactive excise upon a single event or happening as upon a gift by transfer completed prior to the enactment of the taxing statute 26

POINT III. The gift tax is a direct tax, and, not being apportioned as required by the Constitution, is void whether it be applied retrospectively or prospectively. 29

050263

PAGE

1. Taxes on property or an element of property are direct taxes 29
2. The right of gift is an essential element of property 36
   (a) Property is defined as ownership or dominion; the legal right to the possession, use, enjoyment and disposal of a thing 36
   (b) The right of disposal as well as that of use and enjoyment is inherent in and is an essential element of property 40
   (c) The right of gift is an essential element of property. It inheres in each the right of disposal, the right of use, and the right of enjoyment 44
3. A tax upon the right of gift is a tax upon property and, therefore, direct 45
4. If taxes in form indirect extend beyond the limits within which indirect taxes may appropriately operate, they lose their character as indirect taxes and become direct .. 49
5. No sound distinction can be drawn between a tax on the transfer of property by gift and a tax on the right of gift or on the property given 53
6. The gift tax cannot be supported as indirect by the application of any of those tests which are sometimes considered by the courts 60
   (a) The test of whether the tax is an absolute and unavoidable demand 60
   (b) There is no historical basis for declaring the tax in question to be an excise or indirect tax. 61

PAGE

7. The gift tax does not fall within indirect taxes as that term is defined by economists 63
8. The gift tax is not analogous to inheritance and estate taxes nor taxes on gifts intended to take effect in possession or enjoyment at or after the death of the donor, or made in contemplation of death, nor may it be defended as an ancillary to the estate tax 64
9. If the purpose and effect of the gift tax is to compel, subject to the imposition of a penalty tax, the retention intact of large estates, in order that neither the higher rates of the income tax nor the Federal Estate Tax may be avoided, then the gift tax must be considered a direct tax 68

POINT IV. Even if the tax is held to be indirect it is, nevertheless, void because:
The gift tax statute is discriminatory, arbitrary and capricious 72
The gift tax is not uniform within the meaning of that term as it is used in the Constitution with relation to indirect taxes 75
The law is so indefinite and uncertain in its operation that it cannot be enforced 76

List of Cases Cited in This Brief.

	PAGE
Billings v. U. S. (1914), 232 U. S. 261	26, 28, 51, 59
Blair v. Herold (1907), 150 Fed. 199	4
Blodgett v. Holden, 11 Fed. (2d) 180	47, 57, 63, 68
Board of Com'rs v. Rocky Mountain News Printing Co. (1909), 61 Pac. 494 (Colo.)	42, 43
Bowman v. Continental Oil Co. (1921), 256 U. S. 642	51
Brushaber v. Union Pac. R. R. Co. (1916), 240 U. S. 1	26
Buchanan v. Warley (1917), 245 U. S. 60	39
Carnegie Estate (1923), 236 N. Y. 517	10
Carter v. Whitcomb (1908), 74 N. H. 482	11
Chandler v. Kelsey (1907), 205 U. S. 466	10, 11
Chicago Western Ind. R. R. Co. v. Englewood Connecting Rwy. Co. (1886), 115 Ill. 375	38
Child Labor Cases (1922), 259 U. S. 20; 259 U. S. 44	18, 71, 80
Collateral Inheritance Tax (1896), 88 Me. 587	11
Commonwealth v. McCauley's Executor 166 Ky. 450	11
Commonwealth v. Wellford (1913), 114 Va. 372	11
Craig, Matter of (1904), 97 App. Div. 289	9, 10, 13
Craig v. Taylor & Sons (1921), 192 Ky. 36	30
Dawson v. Kentucky Distilleries Co. (1921), 255 U. S. 288	30, 31, 33, 54, 59
Eaton v. B. C. & M. R. (1872), 51 N. H. 504	39
Eidman v. Martinez (1902), 184 U. S. 578	4
Eisner v. Macomber (1921), 252 U. S. 189	21, 30, 35
Fary v. State (1905), 72 Ohio St. 448	10
Exchange Bank v. Hines (1853), 3 Ohio St. 1	42
Flint v. Stone Tracy Co. (1911), 220 U. S. 107	9, 20, 26, 50, 52
Frew v. Bowers, 12 Fed. (2d) 625	18
Frick v. Pennsylvania (1925), 268 U. S. 473	12

PAGE

Galveston R. R. Co. *v.* Texas 210 U. S. 217 31
Gould *v.* Gould (1917), 245 U. S. 151 4
Grand Rapids Booming Co. *v.* Jarvis (1874), 30 Mich. 308 40
Gulf Colo. & Santa Fe Ry. Co. *v.* Ellis (1897), 165 U. S. 150 ..... 14, 72

Hamilton *v.* Kentucky Distilleries Co. (1919), 251 U. S. 146 19
Hecht *v.* Malley 265 U. S. 144 26
Herriott *v.* Patton (1902), 115 Iowa 648 11
Hill *v.* Wallace (1922), 259 U. S. 44 ..... 18, 71, 80
Hovey *v.* The DeLong H. & E. Co. (1914), 211 N. Y. 420 7
Hunt *v.* Wicht (1917), 174 Cal. 205 10

Jaynes *v.* Omaha Street R. Co. (1898), 53 Neb. 631 38

Knowlton *v.* Moore (1900), 178 U. S. 41 ..21, 30, 51, 64, 73
Knox *v.* McElligott (1922), 258 U. S. 546 6
Kuhn *v.* Common Council (1888), 70 Mich. 534 43
Keeney *v.* N. Y., 222 U. S. 525 65

Lacey *v.* State Treasurer (1911), 152 Iowa 477 ... 11
Lansing, Matter of (1905), 182 N. Y. 238 ..... 10, 12
LeFebre *v.* Wilkinson, (unreported) Commerce Clearing House, B. T. A. & Fed. Ct. Service, pp. 7673 7674 24
Levy *v.* Wardell (1922), 258 U. S. 542 6
Lewellyn *v.* Frick (1925), 268 U. S. 238 ..... 7, 8, 10
Lyon, In re (1922), 233 N. Y. 208 10

Magoun *v.* Ill. Savings & Trust Co. (1898), 170 U. S. 283 ..... 64, 72, 73
McCray *v.* U. S., 195 U. S. 27 51
McKelway, Matter of (1917), 221 N. Y. 15 10
McNeir *v.* Anderson, 16 Fed. (2d) 970 ..... 47, 63, 66, 70
Miller *v.* McLaughlin (1905), 141 Mich. 425 10
Milligan, Ex parte (1866), 4 Wall 3 19

National Bank *v.* U. S. (1879), 101 U. S. 1 50
N. Y. Trust Co. *v.* Eisner (1921), 256 U. S. 345 51, 62, 64, 67

PAGE

Nichols v. Coolidge (1927), 71 L. Ed. 797 ..... 15, 16, 17, 29, 31, 58
Nicol v. Ames (1898), 173 U. S. 509 ..... 50, 54, 55

Panama Railroad Company v. Johnson, 264 U. S. 375 7
Patton v. Brady (1902), 184 U. S. 608 ..... 26, 28, 51, 61
Pell, Matter of, (1902) 171 N. Y. 48 10
People v. Common Council (1888), 38 N. W. 470 (Mich.) 43
People ex rel. Manhattan Sav. Trust v. Otis (1882), 90 N. Y. 48 42
Pollock v. Farmers Loan & Tr. Co., 158 U. S. 601 ..... 9, 21, 32, 48

Reynolds v. McArthur, 2 Pet. 417, 434 4

Schlesinger v. Wisconsin, 270 U. S. 230 ..... 13, 66
Shwab v. Doyle (1922), 258 U. S. 529 ..... 6, 23, 48
Sherman v. Elder (1862), 24 N. Y. 381 42
Smith v. Campbell (1825), 10 N. C. 595 39
Southern Ry. v. Greene (1910), 216 U. S. 400 ..... 13, 73
Spreckles Sugar Refining Co. v. McClain, 192 U. S. 397 51
State v. Probate Court of Washington Co. (1907), 102 Minn. 268 10
State v. Safe Deposit (1918), 132 Md. 251 10
Stauffer, Succession of (1907), 119 La. 66 11
Stockdale v. Insurance Co. (1873), 20 Wall. 323 ..... 26, 27

Thomas v. U. S. (1904), 192 U. S. 363 ..... 9, 20, 50, 52
Thompson v. McLeod (1916), 112 Miss. 383 34
Thompson v. Krautzer (1916), 112 Miss. 165 30
Todd v. Wick Bros. (1881), 36 Ohio St. 370 38
Trusler v. Crooks, 269 U. S. 475 ..... 18, 71, 80
Tyson & Bro. v. Banton, 71 L. Ed. 493 ..... 55, 56

Union P. R. Co. v. Snow, 231 U. S. 204, 58 L. Ed. 184 8
Union P. R. Co. v. Laramie Stock Yard Company, 231 U. S. 190 4

	PAGE
Union Trust Co. *v.* Wardell (1922), 258 U. S. 537	6
United States *v.* Bennett (1914), 232 U. S. 299..	76
United States *v.* Cohen Grocery Co. (1920), 255 U. S. 81	19
United States *v.* Daugherty, 269 U. S. 360	80
United States *v.* Field (1924), 255 U. S. 257	4
United States *v.* Goelet, 232 U. S. 293, 58 L. Ed. 610	79
United States v. Heth (1806), 3 Cranch (7 U. S.) 399	5
United States *v.* Jim Fuey Moy (1916), 241 U. S. 394	7
United States *v.* Perkins (1896), 163 U. S. 625..	51
United States *v.* Phellis, 257 U. S. 168	59
United States *v.* Russell (1871), 13 Wall 623	19
United States *v.* Wigglesworth, 2 Story 369	4
Vanderbilt, Matter of (1902), 172 N. Y. 69	10
Veasie Bank *v.* Fenno, 8 Wall, 513	50
Wynehamer *v.* People, 13 N. Y. 378	41, 54

TREATISES.

Blackstone, Commentaries	37
Kent, Commentaries	40, 41
Kickerman, Systema de Disciplina Politica	63
Rutherford, Institutes of Natural Law	37, 38

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1927.

JOHN W. BLODGETT,
Plaintiff-in-Error,

against

CHARLES HOLDEN, as Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant-in-Error.

DOCKET No. 779.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF OF C. ALEXANDER CAPRON AND RUSSELL L. BRADFORD AS AMICI CURIAE AND ON BEHALF OF GEORGE McNEIR.

The undersigned, C. Alexander Capron and Russell L. Bradford, upon leave of this Court granted on May 16th, 1927, submit the following brief, as *amici curiae*, and on behalf of George McNeir, the plaintiff in *McNeir* v. *Anderson*, which case is pending in this Court upon writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit (Docket No. 966).

With the exception of one point the questions presented in *Blodgett* v. *Holden* are substantially the same questions presented in the case of *McNeir* v. *Anderson*. In the case of *Blodgett* v. *Holden* the gift consisted in

the main part of state and municipal bonds. The gifts in the *McNeir* case were of cash and corporate stocks. In view of the practical identity of the questions presented we shall address our argument to the court as though we were arguing the questions incident to and presented by the case of *McNeir* v. *Anderson*.

Facts.

On January 8th, 1924, and prior not only to the enactment of the Revenue Act of June 2nd, 1924, but prior to its introduction in Congress, and to any public discussion, so far as we are advised, of a tax upon gifts, George McNeir transferred by deed of trust to The Farmers' Loan and Trust Company, as Trustee, certain shares of stock having a then market value of $806,400.00. He made certain other transfers or gifts of cash during 1924, those made before the effective date of the Gift Tax Act being in the sum of $600.00, and those made subsequently amounting to $3,700.00. During that year he also made gifts in the sum of $12,411.50 to charitable, religious, educational and scientific organizations but these were exempted from the tax by the Act. The total of the gifts amounted to $822,111.50. Deducting the exemptions, amounting to $12,411.50 and the $50,000.00 personal exemption to residents of the United States, left a balance of $760,700.00 which was alleged to be subject to the tax, and the tax thereon of $47,284.00 was collected over the protest of, and under duress upon, McNeir by the collector of internal revenue. (See Transcript of Record, p. 56). An action to recover the tax was brought in the United States District Court for the Southern District of New York on February 7th, 1925. The collector thereafter moved to dismiss the complaint which set forth the above facts upon the ground that it did not state facts sufficient to constitute a cause of action.

The United States District Court for the Southern District of New York declared the statute unconstitutional on February 15, 1926 (10 Fed. (2d) 813). The United States Circuit Court of Appeals for the Second Circuit upon writ of error reversed the decision of the District Court (16 Fed. (2) 970). This court granted a writ of certiorari on March 21st, 1927, and upon subsequent motion made by counsel for the said plaintiff to advance the said cause to be heard with that of *Blodgett* v. *Holden*, on May 16th, 1927 denied the said motion, but granted leave to counsel to file a brief as *amicus curiae* in the case of *Blodgett* v. *Holden*, the case now in suit.

The *McNeir* case presents the following issues which are also incident to *Blodgett* v. *Holden*:—

First: May the provisions of Part II, Title III of the Revenue Act of 1924 (Sections 319-324 inclusive), properly construed, be applied to gifts by transfer completed prior to the enactment of the said Revenue Act of 1924 on June 2nd, 1924? (Not certified in *Blodgett* v. *Holden*.)

Second: If the said Act is retroactive in terms, is it constitutional when applied to gifts by transfer completed prior to its effective date?

Third: Is not a tax upon gifts *inter vivos*, and not in contemplation of death, a direct tax within the meaning of the Constitution and thus unconstitutional because not apportioned?

Fourth: Without regard to the power of Congress to impose a tax upon gifts, is not the statute in suit unconstitutional because of lack of uniformity and because of its capricious and arbitrary provisions?

POINT I.

Properly construed the gift tax levied by Part II of Title 3 of the Revenue Act of 1924 is not retroactive.

It is a canon of statutory interpretation that taxing acts in case of doubt are construed most strongly against the taxing power and in favour of the taxpayer. *United States* v. *Wigglesworth*, 2 Story 3, B. G. 369; *Blair* v. *Herald*, (1907) 150 Fed. 199, 201; *Eidman* v. *Martinez* (1902) 184 U. S. 578; *United States* v. *Field* (1921) 255 U. S. 257; *Gould* v. *Gould* (1917) 245 U. S. 151, 153.

It is also a cardinal principle of the law that all legislation having to do with human conduct should be construed if possible as having only a prospective effect. Chief Justice Marshall in *Reynolds* v. *McArthur*, 2 Pet. 417, 434, said:

> "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively, unless the language of the Act shall render such construction indispensable."

In *Union Pacific Railroad Co.* v. *Laramie Stock Yards* (1913) 231 U. S. 190 at p. 199, Mr. Justice McKenna expressed the same thought in the following language:

> "Construction, therefore, becomes necessary, and the first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent

rights or by which human action is regulated, unless such be *'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' United States* v. *Heth*, 3 Cranch, 399, 413, 2 L. Ed. 483; *Reynolds* v. *McArthur*, 2 Pet. 417; *United States* v. *American Sugar Refining Company*, 202 U. S. 563, 577; *Windfree, Admr.* v. *Northern Pacific Ruy. Company*, 227 U. S. 296." (Italics ours.)

This Court also said in *U. S.* v. *Heth* (1806) 3 Cranch (7 U. S.) 399, 413:

> "Words in a statute ought not to have a retrospective operation, unless they are so *clear, strong, and imperative*, that no other meaning can be annexed to them. * * * *" (Italics ours).

We submit that a proper and reasonable construction of the statute in suit (Section 319, Revenue Act of 1924) is that it has application only to all gifts made during "the calendar year 1924" *after* the effective date of the Act.

That this is the correct construction of the act is indicated not only by the provisions of the act itself, but also by the amendatory act of 1926. Section 1104 of the Revenue Act of 1924 stated, "Except as otherwise provided, this act shall take effect upon its enactment."

It was otherwise provided in Title II relating to income taxes. Section 283 provided the income tax provisions should take effect as of January 1st, 1924. It was also otherwise provided in Title VIII, relating to stamp taxes. Section 800 made the new stamp taxes effective thirty days after the enactment of the act. But there is no provision that the gift tax law shall take effect except at the date of the enactment of the law, to wit, on June 2, 1924.

That Congress intended that that law should take effect only on June 2, 1924, and should not relate to gifts

made prior thereto, is shown by the provisions of the amendatory act of 1926. Section 319 of the law of 1924 specified the rates of the tax on gifts. Section 324 of the Revenue Act of 1926 amended Section 319 by reducing the rates of tax. Congress provided in subdivision (b) of Section 324 of the 1926 Act, that this reduction in rates should take effect as of June 2, 1924. Thus we find that if gifts made prior to June 2, 1924, were subjected to a gift tax, they are to be taxed at the rate originally specified in the 1924 Revenue Act, whereas the gifts made after June 2, 1924, are to be taxed at the reduced rates. Obviously, Congress did not intend to so provide.

It is also significant that it was specifically provided that the income tax provisions of the 1924 Revenue Act should take effect as of January 1st, 1924. Why was this done, if the provisions relating to the income collected during the taxable year, or during the calendar year, must be construed as referring to the income collected during the entire calendar or taxable year.

The provisions of the Federal Estate Tax Act of 1916 were held by this court not to be so strong, clear and imperative as to render unavoidable a construction that transfers completed prior to the effective date of the act were within the provisions of the law.

Shwab v. *Doyle* (1922) 258 U. S. 529;
Union Trust Co. of San Francisco v. *Wardell* (1922) 258 U. S. 537;
Levy v. *Wardell* (1922) 258 U. S. 542;
Knox v. *McElligott* (1922) 258 U. S. 546.

In the first three of the above cases, this court construed the words "any transfer of which the decedent *has at any time* made a transfer" etc. as having no application to transfers made prior to the passage of the Act. And this notwithstanding the Federal Estate Tax Act of September 8th, 1916 (See Section 201, Revenue

Act of 1916, Title II, 39 Stat. 777-780) had provided definitely "that a tax * * * is imposed upon the transfer of the net estate of every decedent *dying after* the passage of this Act * * *", and by virtue of Section 202 had defined what property or elements constituted the gross estate, and had said that the estate should include "Any transfer of which the decedent *has at any time* made a transfer, etc."

In *Lucellyn* v. *Frick* (1925) 268 U. S. 238, this court likewise construed the language of the Revenue Act of February 24, 1919 (40 Stat. 1057) Section 402 (b) as having no application to insurance taken out by the decedent upon his own life payable to specifically named beneficiaries, when the policies were taken out prior to the passage of the Act in question.

It is the established practice of this court to avoid giving to a statute a construction which involves constitutional difficulties and doubts, if another and reasonable construction may be given it. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390; *U. S.* v. *Jim Fucy Moy*, 241 U. S. 394, 401; *Hovey* v. *De Long H. & E. Co.*, 211 N. Y. 410, and *Lucellyn* v. *Frick* (1925) 268 U. S. 238, 251. In the latter case the Court, through Mr. Justice Holmes, said (pp. 251-252):

> "Acts of Congress are to be construed *if possible* in such a way as to avoid grave doubts of this kind. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

By construing the law as subjecting to the tax only such gifts as were made after June 2, 1924, grave doubt

as to the constitutionality of the statute upon one score will be relieved. Such construction will preserve the general principle "that laws are not to be considered as applying to cases which arose before their passage," and no unexpected liability will be imposed on persons who made gifts before that date, "that, if known, might have induced those concerned to avoid it and to use their money in other ways." *Llewellyn* v. *Frick*, 268 U. S. 238, 252.

A literal interpretation will not be given to a statute when by doing so antecedent rights are affected or human conduct given a consequence it did not intend. In *Union P. R. Co.* v. *Snow* (1913), 231 U. S. 204, 213, Mr. Justice McKenna said:

> "Courts will not, as we have seen, *enforce a literal interpretation when by doing so antecedent rights are affected or human conduct given a consequence it did not intend.* Such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative. And we have pointed out that we are repelled from doing so by grave doubts of its legality as well as of its justice. These considerations need not be further expanded. Their strength has been pointed out, and their sufficiency to *prevail over a literal interpretation* of a statute." (Italics ours).

We submit Congress intended that only gifts made after the effective date of the act should be subject to the tax, and that this construction should be given to the statute by the courts.

POINT II.

If the statute is construed to apply to gifts which were completed prior to the enactment of the statute, it is unconstitutional.

Retrospective laws, it has been said, are not only unjust but do not conform with the social compact. When they are punitive they are directly forbidden by the Constitution and are called *ex post facto* laws. (Art. I, Sec. 9). An excise tax connotes the absence of an absolute and unavoidable demand. (*Thomas* v. *United States*, 192 U. S. 363; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Pollock* v. *The Farmers' Loan and Trust Company*, 157 U. S. 429 and 158 U. S. 601). It is a privilege tax and thus must, in order to justify the validity of its imposition, comprehend an election or discretion or choice or the exercise of a privilege, by the person subjecting himself to the tax. If there be no election, no discretion, choice or privilege or option that may be availed of, or if the privilege has already ripened into a right (see *Matter of Craig* (1904) 97 A. D. 289, 181 N. Y. 551), then there is nothing upon which the tax can fasten. In other words, if the privilege or the act is *fait accompli*, to call the tax an excise upon something that is no longer a privilege is a contradiction in terms.

It would seem patent that an excise tax must rest upon an excisable act and that if there is no such act performed after the taxing statute takes effect, there can be no tax. That this is so has been recognized by this court and by the courts of the various states when attempts have been made by the states to impose excise or indirect taxes upon transactions or transfers completed before the effective date of the taxing statute.

The state courts, when death duties or inheritance taxes were sought to be applied retrospectively, have,

with practical unanimity, decided that such legislation is unconstitutional. The leading case and one that has been cited by the Supreme Court of the United States (*Chanler* v. *Kelsey*, (1907) 205 U. S. 466, 480; *Llewellyn* v. *Frick* (1925) 268 U. S. 238, 251) is the case of *Matter of Pell* (1902) 171 N. Y. 48. The statute involved in the *Pell* case was one in terms imposing a tax upon the coming into actual possession or enjoyment of remainders or estates in expectancy, which had vested prior to June 30th, 1885. The New York Court of Appeal held the statute to be unconstitutional. The Court said, at pp. 55-56:—

> "It, therefore, follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation * * *. If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment."

It is now definitely settled that a state may not impose a succession or transfer tax or an excise where the property has vested or been transferred prior to the enactment of the statute. See *Matter of Vanderbilt* (1902) 172 N. Y. 69; *Matter of Craig*, (1904) 97 A. D. 289, aff'd on opinion below 181 N. Y. 551; *Matter of Lansing* (1905) 182 N. Y. 238; *In re Lyon* (1922) 233 N. Y. 208; *Andrew Carnegie Estate*, aff'd Court of Appeals 236 N. Y. 517; *Matter of McKelway* (1917) 221 N. Y. 15, 19.

The highest courts of other states have followed the *Pell* case and have, in substance, held that if there is no succession or no transfer after the effective date of the Act, the death duty or succession tax may not apply. *Hunt* v. *Wicht* (1917) 174 Cal. 205, 162 Pac. 639; *State* v. *Probate Court of Washington County* (1907) 102 Minn. 268; *Miller* v. *McLaughlin* (1905) 141 Mich. 425; *Eury* v. *State* (1905) 72 Ohio St. 448; *State* v. *Safe Deposit &*

Trust Co. (1918) 132 Md. 251; *Lacey* v. *State Treasurer* (1911) 152 Iowa 477; *Herriott* v. *Patton* (1902) 115 Iowa 648; *Commonwealth* v. *Welford* (1913) 114 Va. 372; *Succession of Stauffer* (1907) 119 La. 66, 70; *In re Collateral Inheritance Tax* (1896) 88 Maine 587; *Carter* v. *Whitcomb* (1908) 74 N. H. 482; *Commonwealth* v. *McCauley's Executor*, 166 Ky. 450.

That a transfer or a succession tax, whether the transfer tax be one imposed upon transfers *inter vivos* or imposed upon transfers by death, must have a transfer or a succession upon which the tax can fasten, was tersely expressed by Mr. Justice Holmes in his dissenting opinion in *Chanler* v. *Kelsey*, 205 U. S. 466, where he said at p. 480:

> "If then a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the state court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State; and, as the grant may be withdrawn, it may be qualified by a tax. *But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid.* No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Matter of Pell*, 171 N. Y. 48, 55; *Matter of Seaman*, 147 N. Y. 69." (Italics ours).

These words seem entirely appropriate in connection with the Gift Tax Act of 1924 if we substitute in place of the word "succession" the words "transfer by gift". Mr. Justice Holmes there recognized and expressed the principle that a tax upon a succession which had been completed would not be a tax upon the succession. It is, of course, equally true that an attempt to assess a tax upon a gift by transfer that has been completed, that is a past gift, cannot be sustained as a tax upon the gift or upon the transfer. The same thought is again asserted in *Frick* v. *Pennsylvania*, 268 U. S. 473, when the Court said at page 492, in respect of the Pennsylvania Inheritance Tax Law:

> "The Pennsylvania statute is a tax law, not an escheat law. This is made plain by its terms and by the opinion of the State Court. The tax which it imposes is not a property tax, but one laid on the transfer of property on the death of the owner * * * But to impose either tax the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law."

An excise, as heretofore stated, and as we conceive it, can relate only to the exercise of some privilege, of some permission granted by law, and comprehends the elements of option or choice; after the privilege has been availed of it may no longer be the object of an excise. The privilege having ceased to exist, or the act being impossible then to exercise, there remains no act or privilege, or ordinance of government or license of law to excise. "Where there is no transfer there is no tax and a transfer made before the passage of the Act relating to taxable transfers is not affected by it* * * *." (*Matter of Lansing*, (1925) 182 N. Y. 238, 247.)

In the Lansing case the Court of Appeals of New York said, at page 248:

> "Now, suppose that the state at the time it imposed the inheritance tax instead of enacting that statute had forbidden the making of wills and succession in case of intestacy, itself taking all the property that a decedent might leave at the time of his death, such a statute could have no possible effect on Mrs. McVickar's rights, for those rights had been acquired long before. Therefore, what privilege did she get at that time from the state for which it can charge or impose a tax?"

If what was a privilege (assuming that *the right* of gift ever was a privilege) is no longer a privilege, and has become a right, it is too late to galvanize the dead privilege into life for the purpose of compelling revenue. "When the privilege has ripened into a right it is too late to impose conditions of the character in question." (*Matter of Craig*, 97 A. D. 289, aff'd 181 N. Y. 551).

The Congress may not turn back the tide of time and say that the thing, the act, that occurred yesterday occurs today, or reach back into the remote past and by its touch, its legislative fiat, quicken the departed nonexistent act of another year into a living act of the present, merely to satisfy the demands of revenue. Property and persons may be taxed and the right to impose the tax lies with the Congress. Of course, the property transferred by gift may be taxed, but the imposition of a tax on such property, simply because of the manner in which it was transferred, would not be a proper classification but an arbitrary selection, and thus void and unconstitutional. Similarly the person who made the transfer might be taxed, but similarly Congress could not impose a capitation tax upon a person simply by reason of the fact that he had done a lawful act which was not subject to tax at the time he performed it, for this would be arbitrary selection and not proper classification. There is no greater propriety in the assessment of a tax directly upon a person by reason of his having

taken part in a lawful transaction at some past time than there is in imposing a tax upon redheaded men simply because they are redheaded men. (*Gulf, Colo. & Santa Fe Ry. Co.* v. *Ellis* (1897) 165 U. S. 150, 155).

A. The imposition of a tax upon persons by reason of gifts made by them prior to the effective date of the Act is not taxation but an arbitrary exaction and a taking of property in violation of the Fifth Amendment.

"Arbitrary selection, it has been said, cannot be justified by calling it classification." (*Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 417).

To impose a tax upon gifts made five months and two days before the Act took effect and to exclude from the operation of the Act gifts which were made five months and three days or five years and two days before the Act took effect is an arbitrary selection and not classification, and attempts to tax persons or acts so arbitrarily selected have been condemned by this Court.

It was such arbitrary selection as in the statute in suit that compelled this Court in *Schlesinger* v. *Wisconsin* (1926), 270 U. S. 230) to hold unconstitutional a statute of Wisconsin which imposed a tax upon all gifts made within six years of death. Such a tax was not classification but arbitrary selection and thus offended the Fourteenth Amendment to the Constitution. Mr. Justice McReynolds said at pp. 239-240:

> "The Court below declared that a tax on gifts *inter vivos only* could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary'. We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment." (Italics ours)

There does not seem to us any distinction between the arbitrary selection of those making gifts within six years of death under the Wisconsin statute and the arbitrary selection of those who have made gifts within five months and two days under the Federal statute. Both statutes undertake to select a determinable few for the imposition of the tax and leave free all others. This, the court said was such a classification as would be in plain conflict with the Fourteenth Amendment. We submit that it is such a classification, if it be classification at all, as would be in plain conflict also with the Fifth Amendment.

The acts of the Congress are just as amenable to the constitution as the acts of the state legislatures, and when the Congress transcends its power, or undertakes to impose taxation not based upon some reasonable classification but upon its whim or caprice, this court has declared that such a tax is a violation of the Fifth Amendment, for such a tax would amount to nothing more nor less than an arbitrary selection of the subjects of tax.

In *Coolidge* v. *Nichols* (71 L. Ed. 797) (not yet published in the official reporter), the court flatfootedly stated that Congress could not impose a retroactive excise upon a single act or event completed before the imposition of such excise.

The Government had contended that the Federal Estate Tax Act of 1918 (Sections 401, 402 (c) and 409) did not impose a tax upon transfers completed prior to the enactment of the Act, but imposed a tax only upon the estate that passed at death, measured by including in the gross estate, property transferred by the decedent prior to the enactment of the tax law. The court rejected the argument of counsel that the statute did not impose a tax upon the transfers completed prior to the Act for it said, referring to Section 402:

> "The language of this section inhibits the conclusion that only subsequent transfers are to be included."

and the court further said:

> "The language of the statute is not consistent with the idea that it utilizes the gross estate merely to measure a proper charge upon the transfer by death. See Lewellyn *v.* Frick, supra."

The court then continued and stated:

> "Frick *v.* Pennsylvania, 268 U. S. 473-494, rejected a somewhat similar claim, and said: 'Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail."

The court then further proceeded to say:

> "Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress *may not lay a charge upon what is beyond them.* Taxes are very real things and statutes imposing them are estimated by practical results." (Italics ours.)

The court there definitely recognized that the statute itself undertook to impose a tax upon the transfer made prior to death as a part of the estate of the decedent.

This the court said was beyond the power of the Congress.

The court then took up the question of the measurement theory advanced by the Government, that is, that the tax is not upon the transfer prior to death or upon the value of the property so transferred, but was upon the property that passed by death measured by the value of the property that had passed prior thereto, together with the property that passed at death. Such a basis this Court held was a violation of the Fifth Amendment. Mr. Justice McReynolds said (at page 802):

> "This Court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the 5th Amendment. Brushaber *v.* Union P. R. Co., 240 U. S. 1, 24, 60 L. Ed. 493, 504, L. R. A. 1917 D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917 B, 713; Barclay & Co. *v.* Edwards, 267 U. S. 442, 450, 69 L. Ed. 703, 706, 45 Sup. Ct. Rep. 348. See also Knowlton *v.* Moore, 178 U. S. 41, 77, 44 L. Ed. 969, 984, 20 Sup. Ct. Rep. 747. And we must conclude that Sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Could anything be more arbitrary and capricious than to select a determinable group already in existence, (namely, those who made gifts from January 1st to June 1st, 1924) and subject them to tax, and leave exempt and free of the tax, all those who had done the same thing prior to January 1st, 1924? We submit that whether the attempted tax be direct or indirect, it is nevertheless an unavoidable demand, with no basis of classification, and is imposed upon an arbitrarily selected few. This is

selection of the most definite kind. It is arbitrary and capricious to the highest degree. The tax is made to depend upon the sport of fortune (*Frew* v. *Bowers*, 12 Fed. (2) 625) or upon the whim of Congress as to what date its retrospect may be made to apply.

As shown in the statement of facts, Mr. McNeir made gifts after the passage of the act in question, amounting to $3,700. The tax imposed amounted to $47,284. It is obvious that only by including the gift made by Mr. McNeir on January 8th, 1924, could such a tax be computed. No more graphic example could be presented of the absurdity of the position of the government that a tax upon one transaction upon which Congress may lay an excise, may be measured by including therein transactions which it is beyond the power of Congress to tax. The government has not had the temerity in this case to advance such an argument as the figures show that it would be utterly fallacious.

The tax as imposed is not only arbitrary and capricious, and thus a violation of the due process of law clause of the Fifth Amendment, but it is also in violation of that amendment because it is a taking of private property for public purposes without just compensation.

Before June 2nd, 1924, there was no law or ordinance in respect of gifts *inter vivos*, either State or Federal. From January 1st to June 2nd, 1924, and every year prior to that as far as 1789 a gift might be made without let or hindrance by law. There is no regulatory power in Congress over gifts and that it may not regulate by taxation what it may not regulate directly is settled by this Court. (Child Labor cases (1922), 259 U. S. 20; *Hill* v. *Wallace* (1922), 259 U. S. 44; *Trusler* v. *Crooks* (1926), 269 U. S. 475.) Therefore when the Congress on June 2nd, 1924, says that all who have done with their property during the elapsed period of the year 1924 what they had an unregulatable right to do, shall hand over a

portion either of that property or the property they have remaining, it has done nothing more or less than demand the private property of the citizen. Such a demand is sequestration. It is not even the exercise of the power of eminent domain, for even that power may not be exercised by the Government without compensation for the property taken. No power lies in the Congress to confiscate or to sequester property, without just compensation therefor. Even during the stress and exigency of war property may not be taken for public purposes without just compensation to the owner, or without due process of law. (*Ex parte Milligan* (1866), 4 Wall 2, 121-7; *U. S.* v. *Russell* (1871), 13 Wall 623, 627; *Hamilton* v. *Kentucky Distilleries Co.* (1919), 251 U. S. 146, 155, 156; *U. S.* v. *Cohen Grocery Co.* (1920), 255 U. S. 81, 88.)

If Congress may not during war times, when the very life of government may be in jeopardy, take the property of its citizens without compensation, then clearly the Government may not in peace times, under the guise and cloak of an excise, take the property, not of all its citizens in uniform sums, but of a determinable few arbitrarily selected for the purpose. Selected by the whim and caprice of Congress; selected because they had, before the law was passed, ridden a horse, attended the theatre, or made a gift. A tax so imposed is whimsicality run mad. A tax so imposed is a direct taking of property, is confiscation; so imposed it is repugnant to the Fifth Amendment to the Constitution.

B. If the statute be construed to have retrospective application, it is a direct tax.

In giving the power to the Congress to impose taxes, the Constitution of the United States prohibited it from imposing only one tax, that is a tax upon exports (Art. 1, Sec. 9, Cl. 5) and laid down two regulatory provisions as to the imposition of the two great divisions of taxation, that is, the imposition of direct taxes on the one hand

and the imposition of indirect taxes on the other hand. Duties, imposes and excises, that is, indirect taxes, must be uniform throughout the United States and this uniformity has been held to be a geographical uniformity.

Direct taxes must be apportioned among the several states in accordance with the provisions of Art. 1, Sec. 2, Cl. 3 and Sec. 9, Cl. 4 of the Constitution. So important was this inhibitory regulation upon the Federal Congress in the imposition of direct taxes considered at the time the Constitution was drafted, it was twice expressed, once positively and once negatively, the only occasion of a duplication in that whole instrument.

If the tax in suit be direct then it is unconstitutional. If the tax retroactively imposed, looking at the substance and practical results of the tax law, and not at the form of the statute, is an absolute and unavoidable demand, then the tax is a direct tax. If the element of absolute and unavoidable demand is present in the impact of the tax, then, as this Court has held, the tax becomes a direct tax.

In *Thomas* v. *United States*, 192 U. S. 363, this Court, through Chief Justice FULLER, said at page 371:

> "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is *contingent on the happening of the event of sale*, and the element of *absolute and unavoidable* demand is lacking." (Italics ours.)

To the same effect this Court, in *Flint* v. *Stone Tracy Co.* (1911), 220 U. S. 107, 151, citing the *Thomas* case, said:

> "The requirement to pay such taxes involves the exercise of privileges, and the *element of absolute and unavoidable demand is lacking*. If business is not done in the manner described in the statute, no tax is payable."

If a tax may not be shifted regardless of whether some direct taxes may or may not be shifted, and amounts to an absolute and unavoidable demand, then the tax must be declared by the Courts to be direct and to be void if not apportioned. (*Pollock* v. *The Farmers' Loan and Trust Company*, 158 U. S. 601.)

If there be nothing to transfer after the effective date of the Act, and if there be no act of transferring, then there is nothing upon which the tax can fasten. Mr. Chief Justice White, deciding *Knowlton* v. *Moore* (1900), 178 U. S. 41, said:

> "* * * if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed."

The same is true in the application of the Gift Tax Act of 1924. If there be no transferring, there would be no act to which the tax could apply. If the tax be said to be upon the past act of giving, then there would be no giving during the term of the operation of the statute for that act of giving, that exercise of the right of gift, had ceased. If the tax as retrospectively applied is not upon the giving, as in truth and fact it cannot be and remain an excise, then it must be either on the donor personally, which in substance would be a capitation tax, or upon the property transferred, in either of which cases the tax would offend against the constitutional restrictions.

The tax is, in effect, as retrospectively applied, direct upon the person of the giver. He is immediately and definitely singled out by the language of the statute and called upon to pay a tax, without having at any time had an option or election or a choice as to whether or not he would subject himself to the tax. If this be not an absolute and unavoidable demand, then we submit that we find it difficult to conceive of a case of an absolute and unavoidable demand of a tax.

If the Congress of the United States has the power to impose a so-called excise upon a gift completed prior to the enactment of the Act, then the Congress unquestionably may impose a tax upon every gift made by every individual since the adoption of the Constitution of this Country. If the statute may be read that the Congress imposed a tax upon all gifts made during the calendar year 1924 and the intention of Congress was that the impact of the tax should apply to transfers completed before the enactment of the Act, then it could equally as well have passed a statute reading that for the calendar year 1890 (or e. g. 1875) and each calendar year thereafter a tax shall be imposed upon all gifts by transfer. The amount of the exemption is a question of statutory grace. It has nothing to do with the validity or invalidity of the tax. If retroactive application of the statute may apply for a period of five months and two days, then there is no limit to the retrospect with which a statute may apply. In a constitutional sense a retrospective application of five months and two days may not be distinguished from a period of retroactivity covering twenty, thirty or forty years past.

The Government in the argument of *Eisner* v. *Macomber* (1921) 252 U. S. 189 abandoned its contention that stock dividends constituted income *per se* and tried to uphold the provisions for the taxation of stock dividends upon the ground that the tax was an excise upon the past accumulation of profits and imposed at the time of the translation of the past accumulation into a stock dividend. This court denied this contention and stated that while the Congress could impose a tax upon the past accumulated income at the time of the translation of it into a stock dividend, such a tax would be a direct tax upon property and must be apportioned in accordance with the provisions of the Constitution. The court said, at page 217:—

"That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interest might be valued in view of the condition of the company, including its accumulated and undivided profits, is equally clear. *But that this would be taxation of property because of ownership, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this Court.*" (Italics ours.)

That a tax upon a single act or event completed before the enactment of the law imposing the tax could only be upheld as a direct tax was probably the thought that created such misgivings in the mind of Mr. Justice McKenna, when considering *Schwab* v. *Doyle*, *supra*. He said at p. 535:

"If retroactivity be accepted, what shall mark its limit? The Circuit Court of Appeals found the interrogation not troublesome. It said: 'Congress would, we think, scarcely be impressed with a practical likelihood that a transfer made many years before a grantor's death (say 25 years, to use plaintiff's suggestion) would be judicially found to be made in contemplation of death under the legal definition applicable thereto, and without the aid of the two years *prima facie* provision.' In other words, the sense of courts and juries, good or otherwise, might, against the words of the statute, and against what might be the evidence in the case, unhelped by the presumption declared, fix the years of its retrospect. This would seem to make the difficulty or ease of proof a substitute for the condition which the statute makes necessary to the imposition of the tax; that is, the disposition with which the transfer is made; and certainly whether that disposition exist at an instant before death or years before death, it is a condition of the tax.

The construction of the Government is more tenable though more unrestrained. It accepted in

bold consistency, at the oral argument, the challenge of twenty-five years, and a ruling of the Commissioner of Internal Revenue, in bolder confidence, extends the statute to 'transfers of any kind made in contemplation of death *at any time whatsoever* (italics ours) prior to September 8, 1916.' The sole test in the opinion of that officer is 'the date of the death of the decedent.' He fixes no period to the retrospect he declares, but reserves, if he be taken at his word, the transfers of all times to the demands of revenue. In this there is much to allure an administrative officer. Indeed, its simplicity attracts anyone. It removes puzzle from construction and perplexity and pertinence on account of the distance of death from the transfer, risking no chances of courts or juries, in repugnance or revolt, taking liberties with the act to relieve from its exactions to satisfy the demands of revenue."

The decision closed on p. 537 with the following:

> "And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative, and this cannot be said of the words of the Act of September 8, 1916."

Certainly the United States District Court for the Eastern District of Wisconsin could conceive of nothing more direct than the retrospectively applied tax involved in this suit, for the court there said in *LeFebre* v. *Wilkinson* and *Nunnemacher* v. *Wilkinson* (reported in Commerce Clearing House, Board of Tax Appeals and Federal Court Service, 1926, pages 7673, 7674):

> "The Court: I think Mr. Glicksman is right in saying that the whole proposition comes down to the single direct statement: Can an excise tax be effective other than in *future*?
>
> The case comes here really with the necessity, as I might say, of deciding the case definitely. The

proposition that is presented here rests ultimately upon the definitive inclusion or exclusion of elements and ingredients in what is called an 'excise'; I mean, the so-called burden which we term an excise; and it would seem to me that the implication is that as between the Government and the subject who is expected to be reached by the law, either in respect of his property, or as we might say, of his conduct, of his movements, that will be open to choice; the implication in an excise not theretofore existing or not theretofore exacted, to the subject is: 'If you want to do this particular thing, you can do it with the burden attaching to you, which we will now impose on you.'

Then, in the case of a gift, as in the case of certain other taxes that are not direct taxes, the subject can take his choice. If he wants to do it he must submit to the burden which the law imposes upon the doing of the act; but, when it appears that the act has been fully completed prior to the passage of the law, why of course the burden is imposed without the choice of relief by concluding not to exercise the privilege.

Now, when that is so, the question is particularly asked. Here are the gifts made in February and May, 1924, prior to the passage of this act. It seems absurd to say that the Nunnemacher and Lefebor donors should be told on June 2, 1924, that they are now subjected to an excise upon an act wholly beyond their power to revoke, recall, or do a thing in respect of what they had previously done; and how then can you escape the idea, although it is called an excise, that it is nothing more or less than a direct tax, either against their property or against them, in respect of a completed transaction, which, if I might put it that way, at the time Congress passed the law was no longer, as to them, *excisable?*

I am impressed with the fundamental character of that question; that the plaintiffs can well urge it at the threshold of these cases; and being decided favorably to them dispenses with the necessity of considering or, much less, determining the

validity of the law outside of that; and the plaintiffs may take a judgment in each of the cases." (Italics the Court's.)

This Court, so far as we have been able to ascertain, has never yet upheld a retroactive excise upon a single event or happening as upon a gift by transfer completed prior to the enactment of the taxing statute.

The following cases are commonly cited by the Government in support of its position that Congress has unlimited power to impose retroactive excise taxes:—

Flint v. *Stone Tracy Co.* (1910) 220 U. S. 107; *Hecht* v. *Malley*, 265 U. S. 144; *Brushaber* v. *Union Pacific R. R. Co.* (1916) 240 U. S. 1; *Stockdale* v. *Insurance Co.* (1873) 20 Wall. 323; *Patton* v. *Brady* (1902) 184 U. S. 608; *Billings* v. *United States* (1914) 232 U. S. 261.

The facts in these cases do not support the contention.

In *Flint* v. *Stone Tracy Co., supra*, the Court held that an excise might be imposed upon the doing of business in corporate form and that it was not unreasonable to measure the tax by the income received not only after the Act took effect, but also during a few months prior to the enactment of the statute. The tax was something in the nature of a franchise tax of the States, and if the measure of the tax were reasonable, no objection could be found to its imposition. But if the corporation was not doing business upon and after the enactment of the Act in the manner stated in the statute, no tax could have been imposed. The Court distinctly and definitely lays down this qualification in upholding the validity of the statute, for it said, at p. 151:—

> "If business is not done in the manner prescribed in the statute, no tax is payable."

The case of *Heckt* v. *Malley*, 265 U. S. 144, involves substantially the same proposition as that which the

court passed upon in *Flint* v. *Stone Tracy Company*. In the *Hecht* case, the court was considering a capital stock tax, i. e. an excise upon the doing of business as a corporation. In arguing the *McNeir* case in the court below, the government said that in the *Hecht* case "it was held that the provisions of the Revenue Act of 1918, imposing an excise tax upon the privilege of doing business as a corporation, measured by the value of the capital stock for the preceding year, is constitutional, although it imposes a tax upon the doing of business prior to the passage of the Act." The Act was passed February 24, 1919. The year for which the taxes in question were assessed ended June 30, 1919.

In the *Brushaber* case, the court was not called upon to consider whether Congress might impose a retroactive excise tax. The tax there considered was an income tax imposed after the grant of power to Congress to impose such a tax without apportionment. The Sixteenth Amendment did not change the character of the tax. This court had previously held that an income tax upon property, real or personal, was a direct tax. Therefore, the court was considering the propriety of a direct or property tax. The only question really presented was whether it was appropriate to measure this direct tax by the income received not before the constitutional amendment took effect, but after that date, although part of the income had been received before the tax was imposed by statute. This is no authority for the contention of counsel that an excise tax may be imposed retroactively upon a single act or event.

In *Stockdale* v. *Insurance Co.*, 20 Wall. 323, the court was also considering an income tax and the report of that case does not show that counsel argued the question as to whether such an income tax might be retroactively imposed. The questions which the Court considered were whether the Act of 1864, imposing taxes on the income of certain corporations, had expired and also

whether, if it had expired, Congress had effectively revived the Act. Some of the Judges expressed the opinion that the Act had not expired and others that the Act had been appropriately revived. That case did not decide that Congress may retroactively impose a tax upon a single act which had already been competed prior to the enactment of the taxing law.

Clearly *Patton* v. *Brady*, 184 U. S. 608, is not an authority for the contention of the Government. The statute there merely levied a new or increased excise upon tobacco and snuff manufactured and held for sale. The tax did not apply to goods already sold and in the hands of the consumers. There was no retroactivity in the application of this tax.

Billings vs. *U. S.* (1914), 232 U. S. 261, was this. The Act of August 5, 1909, imposed a tax of $7.00 per ton "upon the use of every foreign built yacht, pleasure boat or vessel not used or intended to be used for trade now or hereafter owned or chartered for more than six months by any citizen" of the United States.

Defendant admitted that he being a citizen of the United States had owned and used such a yacht in foreign waters during the year prior to September 1, 1909. This use was in part, viz: August 6, 1909, to September 1, 1909, while the statute was in force. The vessel had been owned for more than six months and had been used after the act was passed. The act was not based on the extent of the use, but merely on the "use". Manifestly the owner was within the express terms of the act and the Court so held, page 282.

Here, again we find a continuation of the excisable act after the taking effect of the statute, as in the *Flint* v. *Stone Tracy Company* and *Hecht* v. *Mallett*. There is a clear distinction between all of these cases, and the imposition of a tax upon a single transaction which has been completed before the passage of the tax law.

While this court has never held valid a retroactive tax upon a single act or event already consummated, there is direct authority that such an attempted tax is in violation of the constitution.

We submit that we have the direct authority of this Court in *Nichols* v. *Coolidge* not only that a transfer made prior to the enactment of the Act may not be subjected to a tax upon the death of a decedent who may have died after the passage of the Act, but going further and saying that the transfer prior to the enactment of the Act may not even be used as a measure for the reckoning and computation of the tax upon property that was properly subject to the tax under the constitutional powers.

We, therefore, submit that if the tax may be construed to apply to gifts made during the year 1924, prior to the effective date of the Act, then the statute is unconstitutional because it is not only a direct tax in that it is an absolute and unavoidable demand, but it is also a violation of the fifth amendment, in that it is not taxation but an arbitrary demand on a selected few, and unsupported by a reasonable classification.

POINT III.

The gift tax is a direct tax, and, not being apportioned as required by the Constitution, is void whether it be applied retrospectively or prospectively.

1. Taxes on property or an element of property are direct taxes.

While at times there may have been some confusion of thought as to the differentiation of direct and indirect taxes, it is now definitely recognized by our courts that

taxes on property or on persons by reason of their ownership of property are direct taxes.

Thus in *Eisner* v. *Macomber* (1921) 252 U. S. 189, p. 217, after conceding that the Congress has power to tax shareholders upon their property interests in shares of corporations, Judge Pitney writing the opinion of the court stated:

> "That this would be taxation of property because of ownership, and hence would require apportionment * * *, is settled beyond peradventure by previous decisions of this court."

In *Dawson* v. *Kentucky Distilleries Co.* (1921) 255 U. S. 288, 294, Mr. Justice Brandeis writing the opinion of the court said:

> "To levy a tax by reason of ownership of the property is to tax the property."

In *Knowlton* v. *Moore* (1900) 178 U. S. 41, Mr. Justice White conceded that taxes "which are the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, are direct taxes."

The Supreme Court of Kentucky in *Craig* v. *Taylor & Sons* (1921) 192 Ky. 36, at p. 39, said:

> "The mere right to own and hold property cannot be made the subject of excises since the levying of a tax by reason of ownership of property is to tax the property."

The Mississippi Court in *Thompson* v. *Krautzer* (1916) 112 Miss. 165, at page 167, said:

> "A tax on a thing is a tax on all its essential attributes; *and a tax on an essential attribute of a thing is a tax on the thing itself.* * * * No definition of property can be framed which does not include the right of ownership. Consequently, no

> tax can be imposed on the right of ownership, which is not also a tax on property." (Italics ours)
>
> Cited in *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 294.

It will be observed that in some instances the postulate that a tax on property is direct, has been expressed by saying that a tax on the ownership of property, or on property by reason of ownership, is a direct tax. However, these are merely variations of expression, for as we shall hereafter point out, the word "property" includes within its concept ownership, and an object independent of the ownership thereof is not property. There is now unanimous agreement that a tax on property generally (i. e. land or personalty by reason of ownership) is a direct tax.

This is fundamental and has long been accepted. The questions which have concerned the courts are those relating to taxes, which in form were excise or indirect taxes, but which on analysis were found to be taxes on property or on an element of property and, therefore, direct.

The form in which the tax is clothed is not controlling. The substance and effect must determine its character. In *Galveston R. R. Co.* v. *Texas*, 210 U. S. 217, 227, Mr. Justice Holmes said:

> "Neither the state courts, nor the legislature, by giving a tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

This court has repeatedly looked through the form and determined the validity of taxing statutes by their practical results, for "taxes are very real things and statutes imposing them are estimated by practical results." Mr. Justice McReynolds in *Coolidge* v. *Nichols* (1927), 71 L. ed. 797-801.

A tax upon persons or upon property, or upon income from property or upon an element of property which gives it value, is a direct tax. Such was the determination of this court in *Pollock* v. *The Farmers' Loan and Trust Company* (1895), 157 U. S. 429; 158 U. S. 601.

Mr. Justice Field, in his concurring opinion (157 U. S. at page 591) said:

> "It must be conceded that whatever affects any element that gives an article its value in the eye of the law, affects the property itself."

Chief Justice Fuller, declared, after referring to indirect taxes, 157 U. S. 558:

> "But a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes."

Reiterating the fundamental proposition that the substance and not the form is controlling, Chief Justice Fuller said, page 581:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. *It is the substance and not the form*, which controls as has indeed been established by repeated decisions of this Court." (Italics ours.)

After the rehearing, 158 U. S. 601, 627, Chief Justice Fuller said:

> "Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its

plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

"There can be but one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by *forced distinctions between that which gives value to property, and the property itself.*" (Italics ours.)

There can be no disputing this truth so forcibly expressed by Chief Justice Fuller. An element of property that gives it value is property. The artificial segregation of such an element does not change its character. It is of the same substance of the body from which it issues. It is property.

This principle has found repeated recognition both in this and in the State courts.

Thus in *Dawson* v. *Kentucky Distilleries Co.* (1921) 255 U. S. 288, the court held that a tax on the right to take possession of property, that is, the right to take possession of whiskey from a bonded warehouse where it was required by law to be placed, was a direct tax, for possession, or the right to take possession, is one of the elements of property, and is not subject to an excise tax.

Mr. Justice Brandeis said, page 288:

"The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidents; * * * "

The question there considered related to a Kentucky license tax on whiskey distillers or warehousemen with respect to whiskey withdrawn from bond or shipped in bond outside the State. The Court held this was a *property* tax, and hence void, simply because an examination of the possible contingencies in which the tax would or would not become due (p. 293) led to the conclusion that the thing *really taxed* was the *owner's right to take possession of his own property* and that "to tax the right is to tax the value" (p. 294) saying:

> "To levy a tax by reason of ownership of property is to tax the property. Compare *Thompson* v. *Kreutzer*, 112 Miss. 165; 72 So. 891; *Thompson* v. *McLeod*, 112 Miss. 383, L. R. A. 1918 C. 893; 73 So. 193, Ann. Cas. 1918 A, 674. It can not be made an occupation or license tax by *calling* it so. See *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 148 150; 55 L. Ed. 389, 412, 413; 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, 55 L. Ed. 428, 31 Sup. Ct. Rep. 361; *U. S.* v. *Emery, B., T. Realty Co.*, 237 U. S. 28, 59 L. Ed. 825, 35 Sup. Ct. Rep. 499."

Thompson v. *McLeod* (1916) 73 So. 193, 112 Miss. 383, so cited by the court, involved a statute taxing the extraction of turpentine from any trees in the State. The Supreme Court of Mississippi held that this was a property tax, saying at page 388:

> "This Act strikes down the inherent right of the property owner to lay hand upon his own property. Every owner of a pine tree enjoys the same natural right to extract gum from the tree as the owner of a vineyard has to pluck his own grapes. It would be the same thing to require a privilege tax as a precedent right of the owner to pull the ripe pecans from the pecan orchard or to enjoy a drink of pure water from the cool spring of the old homestead."

The question as to whether a tax, claimed by the government to be indirect but, in effect, a tax on property, was again presented to the United States Supreme Court when it was called upon to determine whether Congress could lay a tax upon stock dividends. *Eisner* v. *Macomber* (1921) 252 U. S. 189.

Upon the first argument, the government contended that this was an income tax, but upon the reargument, the government abandoned its position that a stock dividend brought new income to the shareholder, and thus came within the sixteenth amendment to the Constitution. The government there argued, in effect, that the declaration of a stock dividend was a taxable occasion, as the previous accumulation of profits by the corporation for the benefit of its stockholders became manifest through such declaration, and that it was appropriate for Congress to lay a tax thereon.

The Court held that this was not tenable because if it was not income it did not come within the Sixteenth Amendment *and any other tax would be a tax, whether called an excise or not, upon the past accumulated property, and would thus be a direct tax.* The Court said (252 U. S. at p. 217):

> "* * * the Government * * * virtually abandoning the contention that a stock dividend increases the interest of the stockholder or otherwise enriches him, insisted as an alternative that, by the true construction of the Act of 1916 the tax is imposed not upon the stock dividend, but rather upon the stockholders' share of the undivided profits previously accumulated by the corporation; the tax being levied as a matter of convenience at the time such profits become manifest through the stock dividend. If so construed, would the act be constitutional?
>
> "That Congress has power to tax shareholders upon their property interests in the stock of corporations is beyond question; and that such interests might be valued in view of the condition of

> the Company, including its accumulated and undivided profits, is equally clear. But that this would be *taxation of property because of ownership*, and hence would require apportionment under the provisions of the Constitution, is settled beyond peradventure by previous decisions of this Court."

The Court there held that the tax was unconstitutional.

2. The right of gift is an essential element of property.

(a) Property is defined as ownership or dominion; the legal right to the possession, use, enjoyment and disposal of a thing.

The word property is not used to denominate matter or any particular concrete object independently of the ownership thereof, but rather those rights in or to an object which are comprehended in the term ownership. Thus in the Standard Dictionary "property" is precisely defined as

> "Ownership or dominion; the legal right to the possession, use, enjoyment and disposal of a thing; * * * "

It is also defined as

> "Any object of value that a person may lawfully acquire and hold. Anything that may be owned."

It will be seen that while this definition refers to objects, it does so only in connection with their ownership. Independently of ownership and the rights pertaining thereto the term is inapplicable, for the concept of property signifies ownership.

The sea is not spoken of as property. Rather the law says it is the property of no man or nation. Nor are fish in the Atlantic Ocean property, but when they are caught

and owned by someone they at once become property. Although concrete objects may exist without ownership, until ownership attaches they are not property.

It follows that while objects are sometimes referred to as property, that term is always used to denote the abstract rights of ownership pertaining thereto.

In the law property has no other significance.

Blackstone says (1 Wend. Blackstone's Commentaries, Chap. 1, p. 138):

> "The third absolute right inherent in every Englishman, is that of property, which consists in the *free use, enjoyment and disposal of all his acquisitions*, without any control or diminution, save only by the laws of the land. The origin of private property is probably founded in nature, * * * ;" (Italics ours.)

Rutherforth in his Institutes of Natural Law (1799 Ch. 3, p. 53) treating of property, says:

> "Our right to things is either such an one as is common to us with all mankind, or such an one as is peculiar to ourselves. Some things, belong to us, because they belong to the species in general, and to us among the rest. Other things belong to us by such an right, as excludes all the rest of the species from having anything at all to do with them. Such an *exclusive right to things is called property*. Where things are thus fully our own, or where all others are excluded from meddling with them, or from interfering in any manner about them; it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him *from disposing of them as he pleases*, so that, property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either *by exchanging them for other things, or by giving them away* to any person, without any valuable consideration in return, *or even throwing them away*,

which is usually called relinquishing them." (Italics ours.)

Again he said, having reference to the Limitations of Property, in Ch. 4, p. 82:

> "Full property in a thing is a perpetual right to use it to any purpose and *to dispose of it at pleasure*. Property, in the strict notion of it, is such a right to a thing as excludes all persons, except the proprietor from all manner of claim upon it • • • ". (Italics ours.)

It was said in *Todd* v. *Wick Bros.* (1881) 36 Ohio State, 370, at p. 385, that:

> "In a strict legal sense, property, whether the term is applied to things animate or inanimate, consists in the right to their *use, enjoyment*, and *disposition*." (Italics ours.)

In The Chicago & Western Indiana R. R. Co. v. *The Englewood Connecting Ruy. Co.* (1886) 115 Ill. Rep. 375, 385, the Court said:

> " • • • for property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the use of a thing."

In *Jaynes* v. *Omaha Street R. Co.* (1898) 53 Neb. 631, 653, the Court said:

> " • • • • 'Property' in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, and generally to the exclusion of all others, and *doubtless this is substantially the sense in which the word is used in the constitution*, as to the taking or damaging of private property for the public use."

In *Smith* v. *Campbell* (1825) 10 N. C. 595, 597, the Court said:

> "Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. He may *give, grant, or sell it at his pleasure.*" (Italics ours.)

In *Eaton* v. *B. C. & M. R. R.* (1872) 51 N. H. 504, 511, the Court said:

> "The term 'property', although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' "

It will be noted that in all these definitions of property the right of disposition is stated to be an essential element thereof.

Sometimes the courts refer to these rights of possession, use, enjoyment and disposition as essential attributes or incidents of property. Whether it is said such a right is an essential element, or attribute, or incident, the meaning is the same. Such a right is inherent in and is a constituent part of property. If such right is taken or destroyed, it is property which is taken and destroyed, and this the courts have uniformly held.

The United States Supreme Court in *Buchanan* v. *Warley* (1917) 245 U. S. 60, 62 L. Ed. 149, said (in holding an ordinance prohibiting a negro from residing in any city block in which a majority of the houses are occupied by whites invalid) at page 74:

> " * * * Property is more than the mere thing which a person owns. It is elementary that it includes the right to *acquire, use, and dispose* of it.

The Constitution protects these essential attributes of property." (Italics ours.)

The Courts of Michigan, in 1874 in the case of *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308, 320, expressed the view as follows:

> "Of what does property practically consist but of the *incidents* which the law has recognized as attached to the title, or right of property? Is not the idea of property in, or title to the lands, apart from, and stripped of all its incidents, a purely metaphysical abstraction, as immaterial and useless to the owner as 'the stuff that dreams are made of'? Is it not a much less injury to him, if it can injure him at all, to deprive him of this abstraction, than of the incidents of property, which alone render it practically valuable to him? And among the incidents of property in land, or anything else, is not *the right to enjoy its beneficial use*, and so far to control it as to exclude others from that use, the most beneficial, *the one most real and practicable idea of property*, of which it is a much greater wrong to deprive a man, than of the mere abstract idea of property without incidents? This use, or the right to control it with reference to its use, constitutes, in fact, all that is beneficial in ownership, *except the right to dispose of it; and this latter right or incident would be rendered barren and worthless, stripped of the right to the use.* Property does not consist merely of the right to the ultimate particles of matter of which it may be composed, * * * but of those properties of matter which can be rendered manifest to our senses and made to contribute to our wants or our enjoyments." (Italics ours.)

(b) The right of disposal as well as that of use and enjoyment is inherent in and is an essential element of property.

In *Kent's Commentaries* (14th Ed.) Pt. V, p. 320, 501, it is said:

> "The exclusive right of using and *transferring property* follows as a natural consequence, from the perception and admission of the right itself. But, in the infancy and earlier stages of society, the right of property depended almost entirely upon actual occupancy; * * *". (Italics ours.)

He again says, at p. 326 (509):

> "3. *The Rights of Alienation.* The power of alienation of property is a *necessary incident* to the right of property, and was dictated by mutual convenience and mutual wants. It was first applied to movables * * *". (Italics ours).

The Court of Appeals of New York in *Wynehamer* v. *The People* (1856) 13 N. Y. 378, held that:

> "The provisions of the act to prevent intemperance (Laws of 1855, p. 340), substantially destroy the property in intoxicating liquors owned and possessed by persons within the State, when the act took effect.
>
> In its application to such liquors so owned and possessed, the act violates the provision of the state constitution which declares that no person shall be deprived of life, liberty, or property, without due process of law." (From Syllabus.)

The Court, through Comstock, J., said, page 396:

> "Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment."

The Court then cites Kent's statement above quoted concerning the right of alienation of property, and states, page 398:

> "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional pro-

vision intended expressly to shield private rights from the exercise of arbitrary power."

In *Sherman* v. *Elder* (1862) 24 N. Y., 381, 384, the same Court declared:

> "Property considered as an exclusive right to things contains not only a *right to use them but a right to dispose* of them either by exchanging them for other things or *by giving them away to any other person without any consideration, or even of throwing them away.*" (Italics ours.)

In *People ex rel. Manhattan Sav. Trust* v. *Otis* (1882) 90 N. Y. 48, 52, the Court said:

> "Depriving an owner of property *of one of its essential attributes*, is depriving him of his property within the constitutional provision, and a legislative declaration that upon the publication of notice, a negotiable security shall no longer be transferable, is not due process of law, working a forfeiture of the right given by the contract." (Italics ours.)

To the same effect is the case of *Exchange Bank* v. *Hines* (1853) 3 Ohio State 1, 8, wherein the Court said:

> "It is a fundamental principle, that, 'property, considered as an exclusive right to things, contains not only a right to use those things, but a right to *dispose* of them either by exchanging them for other things, or by *giving them away* to any other person, without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them'. Rutherford's Institutes, 20 Puffendorf, Ch. 9, b. 7." (Italics ours.)

The Supreme Court of the State of Colorado, in *Board of Comr's* v. *Rocky Mountain News Printing Co.* (1900) 61 Pac. 494, 496, said:

> "Everything which has an exchangeable value is property. The right of property includes the power to dispose of it according to the will of the owner. * * * (See Slaughter House Cases, 16 Wall, 127, 21 L. Ed. 394)."

The Court after quoting *Exchange Bank* v. *Hines*, 3 Ohio St. 1, and *Wynehamer* v. *People*, 13 N. Y. 378, 396, concluded as follows:

> "It will thus be seen that, in order to constitute property which is subject to ownership, as the terms are used in their broad sense, there *must exist not only the right of use and enjoyment, but the exclusive right to alienate or transfer.*" (Italics ours.)

To the same effect is the decision of the Supreme Court of Michigan in *People* v. *Common Council* (1888) 38 N. W. 470, wherein the Court said:

> "* * * property does not consist merely of the title and possession. It includes the right to make any legal use of it, and the right to pledge or mortgage it, or to sell and transfer it."

Similarly, the Michigan Courts said in *Kuhn* v. *Common Council* (1888) 70 Mich. 534:

> "* * * that property does not consist merely of the title and possession. It includes the right to make any legal use of it, and the right * * * to sell and transfer it."

Thus, it appears, there is unanimous agreement that property is the sum of the rights which it embraces and that one of these is the right of disposal in such manner as the owner may choose.

These statements of the court are simply the recognition of a fact which becomes apparent from the most cursory consideration of our present civilization. The surplus of goods produced by one over what the producer

may himself consume are without value unless they may be disposed of by the producer and transferred to someone else who may use them. If this was true at the time the concept of property was made definite by our early English commentators, it is a thousand times more true in this day of mass production and specialization, where one for months may only make many of the same minute parts of a great machine. Unless these parts may be disposed of they are without value. In our modern civilization it is impossible to conceive of property without the right of disposal as an inherent part thereof.

(c) The right of gift is an essential element of property. It inheres in each the right of disposal, the right of use, and the right of enjoyment.

If this be not so, what is property but the right of a person himself to consume the objects he may own. Stripped of the right of gift, we have but the bare husk.

Consider, if possible, one possessed of a substantial estate deprived of the right of gift. He may still use his estate to satisfy his own personal and selfish desires, but after that his use is limited to the mere exchange and accumulation of further riches. He must of necessity become a modern Midas. He may no longer invite his friends to share the enjoyment and the use of those objects which he possesses. After he has read some book which gave him enjoyment, he may not give that book to another, nor may he lend that book to his friend, for that would be the gift of the use of the book. Nor may he invite his friend to dine with him for he would be giving food and drink to his friend. Nor may he continue to support the Church, the Hospital, the Library, or other forms of charity, although this may be his chief pleasure in life, and the chief use and enjoyment of his property.

It is obvious that the right of gift inheres in the disposal of property. It is equally obvious that the right to use and to enjoy one's property comprehends the right

of gift. To say that one might use or enjoy one's property without this right of gift is obviously fallacious.

The right of gift as an element of property cannot be isolated and segregated as an element standing alone, but it is part and parcel of all of the other elements of property, and is one of the most deep rooted.

3. A tax upon the right of gift is a tax upon property and, therefore, direct.

If our premises are correct, the conclusion is inevitable that a tax on a gift is a direct tax, and we submit there is no escape from the conclusion.

It matters not, in the consideration of this question, that Congress saw fit to declare that certain gifts should be exempt from the tax which it sought to impose. We are not concerned with the graces and exemptions of the Statute. If Congress may tax all gifts over $50,000.00 it may tax all gifts of over 50 cents. In the first bill introduced in Congress the exemption was only $10,000.00 and after that was exhausted every gift of every sort, however small or insignificant, was subject to the tax. Our argument is addressed to the power of Congress to impose an excise upon gifts, not to the whims and caprices of its exemptions. This act necessarily draws in question the power of Congress to lay a tax on a fundamental element of property without apportionment as required by the Constitution.

To declare that Congress has that power, this court must disregard its earlier decisions, for, there can be no sound distinction between the taxation of the gift of property, the income of property or the possession, use or enjoyment of property.

Will this court say that the right of gift is not as valuable as the right to receive the income from property? We submit that in the eyes of most men, the right to use their property not only for themselves, but for their

friends and those dear to them, to promote those objects of charity in which they are most deeply concerned, is of greater value than the right to receive the income therefrom, if after they have received that income they may not use it in such manner as they desire, although such use may involve the gift thereof. Certainly Mr. Carnegie's life, after he had amassed a fortune, indicated that the right of gift was a superior factor in his possession thereof than the collection of income. To say to a man: "You may receive the income of your property, but after you have received it you may only use that income by fattening yourself with the consumption of that which it will purchase, or by accumulating it and turning it into added riches which you must similarly use only for yourself or for added accumulation", is to take from that man the greatest incentive he has to receive such income or to permit his property to produce income.

But the right of gift attaches not only to income but to capital. If a man be deprived of this right, then he is deprived of an element which gives property its value. Without the right to use, enjoy and dispose of property through gift or sharing with others, it has little value.

If Congress cannot lay a tax upon income without taxing property, then it may not impose a tax upon a gift without similarly taxing property. Both are indispensable parts thereof.

In the District Court below, the government practically conceded this, saying:

> "In the instant case, while economically the incidence of the present tax is upon the property itself, its legal incidence is upon the privilege of using, and whether this be called a tax upon consumption, potential use, or capacity for use, it is indirect in the constitutional sense."

Note the phrase "privilege of using". Our courts have recognized that the exercise of a privilege is a

proper subject of an excise or indirect tax, but we are not speaking of privileges but of a right which is a part of property itself.

It needs no argument to demonstrate that the general use of property may not be taxed without taxing property itself. The use of property cannot be transformed into the exercise of a privilege by the fiat of the government. This failure on the part of Congress to distinguish between rights and the exercise of a privilege is significant.

Even Judge Raymond, who in *Blodgett* v. *Holden* (1926) 11 Fed. (2d) 180, sustained the act in question, recognized that the right of gift is inherent in property and that if the tax were upon the right to give, it would be direct. As we shall hereafter show, he was in error in sustaining the tax upon the theory that there is a distinction between a tax upon the transfer by gift and a tax upon the right to give.

In *McNeir* v. *Anderson*, 16 Fed. (2nd) 970, the Circuit Court of Appeals took the bold position that Congress has the power to tax any use of property, although such use is an inherent incident of the right of property, so long as it is possible to use the property at all without incurring the tax.

The argument was concluded as follows:

> "It cannot be successfully contended that the right to give away property exhausts those interests which together constitute the rights of property, so as to amount to the taking of the property."
>
> "But the cases are clear that, where it is impossible to use property at all without incurring the tax, this is a direct tax upon property and unconstitutional. *Pollock* v. *The Farmers' Loan and Trust Company, supra; Dawson* v. *Kentucky Distilleries*, 255 U. S. 288, 41 S. Ct. 272, 65 L. Ed. 638."

As was said by Mr. Justice McKenna, in considering the position taken by the government in *Schwab* v. *Doyle, supra*, page 535:

> "In this there is much to allure an administrative officer. Indeed, its simplicity attracts any one. It removes puzzles from construction and perplexity * * *"

As above indicated, Judge Manton, writing the majority opinion of the court, indicated that he believed that this was the holding of this court to be derived from *Pollock* vs. *The Farmers' Loan and Trust Company.*

Let us consider whether the test which Judge Manton applied would have induced the determination of this court that an income tax is direct. Judge Manton's test is whether the use taxed "exhausts those interests which together constitute the rights of property, so as to amount to the taking of property."

Obviously, the use of property so as to produce income does not exhaust those elements which constitute the property. A man might use his real estate as his home; he might grow produce for his own use upon his land; he might hold his property unproductive until such time as he desired to sell it, and then use his capital for his own use and enjoyment. The investing of property so as to produce an income is only one of numerous uses which may be made of property.

Moreover, it has been recognized that this use of property by the investment thereof, so as to produce an income, is subject to regulation by the legislature of the various states. No one has contended that the usury statutes of the various states, limiting the amount of interest which a person may contract to receive, is a taking of his property or exhausts the rights of property.

The *Pollock* case is not authority for Judge Manton's proposition, but on the contrary is a denial of it. The

doctrine in that case was succinctly expressed by Mr. Justice Field, when he said:

> "It must be conceded that whatever affects any element that gives an article its value in the eye of the law affects the property itself."

As we have heretofore indicated, certainly in the eyes of many, the right of gift is as substantial an element of property as the right to invest it and to receive income therefrom, but it is not necessary to weigh these, and determine which element is of the greater value. It is sufficient to find that a tax has been laid upon an important element of property, for to tax such an element is to tax the property.

4. If taxes in form indirect extend beyond the limits within which indirect taxes may appropriately operate, they lose their character as indirect taxes and become direct.

The courts have not laid down any precise or express definition of indirect taxation as that term is used in the Constitution, nor have they deemed it expedient or necessary to define or definitely mark the scope of indirect taxation. Nevertheless, the decisions of the courts have recognized a sharp and definite distinction between direct and indirect taxes, in applying the constitutional provisions to tax legislation, and have reared a line of division discernible and definite. This line may be said to be a limitation, a boundary, and when the tax in question in operation falls beyond the line it ceases to be, whatever it may be called, within the scope and area of indirect taxation and becomes a direct tax.

A tax laid upon property is not indirect. This is fundamental. Laid upon a right inherent in property, or embraced in the concept of property, it is direct, and has failed to confine its operation in substance and effect within the constitutional area of indirect taxation.

No purpose would be served, even if it were practicable, to attempt to state the full scope of indirect taxes. If the tax be indirect in its incidence, and in its effect, it need only be uniform. If it be direct, whatever it may be called, and whatever its form, it must be apportioned. The courts have had for consideration, time after time, tax legislation, and the decisions relating thereto best illustrate and chart the limits and scope of how far taxes may go in reaching property or the person and still remain within the sphere of indirect taxation. We shall refer to the subjects which the courts have catalogued and stated to be within the field of indirect taxation. These fall within the following groups:

(*a*) The exercise of a privilege, in which may be included the privilege of doing business in a particular way permitted by statute or of dong some other act authorized by statute. For example:

The privilege of issuing bank notes. *Veazie Bank* v. *Fenno* (1869) 8 Wall. 513; *National Bank* v. *United States* (1879) 101 U. S. 1.

A stamp tax on memoranda or contracts of sale of certificates of stock, has been sustained as a tax on a particular transaction under the exercise of the privilege accorded by the laws in respect to corporations of disposing of property in the form of certificates. *Thomas* v. *United States* (1904) 192 U. S. 363.

On the privilege of corporations doing business. *Flint* v. *Stone Tracy Company* (1911), 220 U. S. 107.

(*b*) The doing of business or some other act in a particular way, this being also treated by the courts as the exercise of a privilege, for example, the tax upon each sale or agreement to sell any products or merchandise on an exchange or board of trade or other similar place. *Nicol* v. *Ames* (1898) 173 U. S. 509.

(*c*) Death duties on succession, inheritance and transfers of property at death, the succession of such prop-

erty being a privilege accorded by the sovereign power. *United States* v. *Perkins* (1896) 163 U. S. 625; *Knowlton* v. *Moore*, 178 U. S. 41; *New York Trust Company* v. *Eisner*, 256 U. S. 345.

(*d*) The manufacture of or dealing in certain articles. For example, the license tax on manufacturers of and dealers in oleomargarine. *McCray* v. *United States* (1904) 195 U. S. 27.

The tax on persons or corporations engaged in the business of refining sugar. *Spreckels Sugar Refining Company* v. *McClain* (1904) 192 U. S. 397.

In this group may also be included the tax on certain manufactured articles imposed intermediate the commencement of manufacture and before such articles have passed into the hands of the consumer. For example, the tax upon tobacco or snuff manufactured and sold. *Patton* v. *Brady* (1902) 184 U. S. 608.

In this group may also be included the tax upon gasoline sold or used by distributors, which Mr. Justice Pitney stated was an excise tax. *Bowman* v. *Continental Oil Company*, 256 U. S. 642.

(*e*) The special use of certain articles. For example, the tax upon the use *for pleasure* of foreign built yachts. *Billings* v. *United States* (1914) 232 U. S. 261.

In passing upon various of these taxes, the courts have been careful to pont out the limitations upon the power of indirect taxation, so that their decisions might not be misconstrued as extending the scope of such taxes beyond certain limitations. Thus in *Nicol* v. *Ames, supra*, while sustaining a tax upon the sale of products or merchandise at an exchange or board of trade, Mr. Justice Peckham was careful to point out that the tax would not be indirect, if laid upon all sales made in any place, saying, page 521:

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities

> there offered in accomplishing the sale *differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property.* It takes no notice of any kind of privilege or facility and the fact of a sale is alone regarded." (Italics ours.)

In *Thomas* v. *United States, supra,* Chief Justice Fuller expressed a similar limitation in sustaining the stamp tax on contracts of sale of certificates of stock. He said, page 371:

> "The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property *in the form of certificates.*"

Similarly in *Flint* v. *Stone Tracy Company, supra,* in sustaining a special excise tax with respect to the carrying on or doing business of corporations, joint stock companies, or associations or insurance companies, Mr. Justice Day, delivering the opinion of the court said, page 152, "the requirement to pay such taxes involves the exercise of privileges", but was careful to add: "If business is not done in the manner prescribed in the statute, no tax is payable." He also said, page 150: "The difference between the acts [i. e. receiving income and doing business] is not merely nominal, but rests upon substantial differences between the *mere ownership of property* and the actual doing of business *in a certain way.*" (Italics ours.)

Compare the foregoing with those taxes which the courts have declared to be invalid because they extended beyond the limitations of indirect taxation, and were in effect direct taxes on property, and we find that Congress cannot lay a tax on the general use of an object of ownership, for it cannot so tax that element of use embraced in the right to receive the income of such object. Similarly, Congress cannot lay an indirect tax on the

general right to the possession of an object of ownership, for the right to possession is one of the elements of property in such object; nor may it lay such a tax upon the general disposition of such an object, for the right of disposition is also an element of property. It follows, therefore, as a corollary of the foregoing, that Congress may not lay a tax on gifts in general, for the right of gift is similarly an inherent element of property inhering in the right of use, enjoyment and disposition.

5. No sound distinction can be drawn between a tax on the transfer of property by gift and a tax on the right of gift or on the property given.

All gifts involve a transfer of property. This is axiomatic.

The act in question lays a tax on the transfer of all or any property by gift without regard to the manner in which the transfer is made or the means employed therefor, or the character or kind of property thus transferred.

The effect of the act, therefore, is to tax gifts generally. No attempt is made to select certain articles, the transfer of which by gift shall be subject to tax, nor to specify any special means, the employment of which shall be subject to a tax.

It follows that the right of gift may not be exercised without incurring a tax.

The decisions of the Supreme Court of the United States hold that a direct tax on property would result if Congress should declare:

(*a*) While the owner of an object has the subjective right of use thereof by reason of such ownership, nevertheless, he shall be subject to a tax if he exercises that right by objectively using that property in any manner or for any purpose. (This inevitably follows from the Pollock case, for the right to receive the income is only an incident of the right of use. See also the Mississippi

cases, involving a tax on the extraction of turpentine from trees, cited with approval in *Dawson* v. *Kentucky Distilleries, supra.*)

(*b*) Or if it should declare, while the owner of an article has the subjective right to the possession thereof, he shall, nevertheless, be subject to a tax if he exercises that right by objectively taking possession of the property. *Dawson* v. *Kentucky Distilleries, supra.*

(*c*) Or again, if it should declare that while the owners of property in general have the subjective right to sell it, they shall, nevertheless, be required to pay a tax if they exercise that right objectively by selling any or all of it without regard to the place of sale or the person by whom such property is sold, or the particular means employed of effecting the sale or transfer. *Nicoll* v. *Ames.*

The result of these decisions is that no distinction can be drawn between a tax on the subjective rights which are inherent in and make up property, and a tax on the objective exercise *generally* of those rights. If a tax is laid on the exercise of the right generally, then the tax in effect is upon that right. It then becomes a property tax and, therefore, direct, for the ownership of a right stripped of the power to exercise that right is without value. As stated by the New York Court of Appeals in *Wynehamer* v. *The People* (1856) 13 N. Y. 378, 398:

> "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power."

If the State should declare that hereafter no property might be transferred by gift, it would thereby abolish the right of gift. Such an act would have the same effect as one declaring directly that the right of gift is abol-

ished. The destruction of such a right would of course be the destruction or taking of property.

It follows that Congress may not lay an excise or indirect tax on the only available means of exercising the right of gift (i. e. by the transfer of property), for such a tax would directly affect the right of gift and would thus become a property tax.

In this connection there should be kept in mind the distinction between the inherent rights of property and privileges accorded by statute. It has been recognized by our courts that indirect taxes may be laid upon such privileges. There is also a clear distinction between the taxation of some particular means of exercising an inherent right and the taxation of all means of exercising it, or the exclusive means by which such right may be used.

As pointed out by Mr. Justice Peckham in *Nicol* v. *Ames*, *supra*, if a tax is laid upon all sales of property, it is a property tax, because the right of disposition is an inherent right of property. But Congress may lay an indirect tax on sales of property on an exchange or board of trade, for it is then within the power of the taxpayer to say, "I shall sell my property in some other manner, and shall not subject myself to the payment of the tax by selling it in the manner specified in the taxing act."

That the right of disposition of property by sale is an inherent attribute of property has very recently been recognized by this court in *Tyson & Bro.* v. *Banton*, 71 L. ed. 493. (Not yet reported in the official reporter.)

Not only the right to sell but the right to fix the price at which the property shall be sold, was there recognized as being inherent in property, Mr. Justice Sutherland saying (p. 495):

> "In the endeavor to reach a correct conclusion in respect of this inquiry, it will be helpful, by way of preface, to state certain pertinent considerations. The first of these is that the right of the

> owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, *State Freight Tax*, 15 Wall 232, 278, and, as such, within the protection of the due processes of law clauses of the fifth and fourteenth amendments."

If then, neither the State nor the Federal government may regulate the price for which goods shall be sold unless "the business or the property involved has become 'affected with a public interest' ", because to do so would be to deprive persons of property without due process of law, then it follows that neither the States nor the Federal government may restrict the gift of property without similarly depriving persons of property without due process of law. If the State of New York may not limit the price for which theater tickets may be sold by a broker, neither may the State provide that theater tickets shall not be transferred or disposed of without any compensation. And the reason why the State of New York may not do so is that the right to sell the ticket, and to fix the price for which it shall be sold, is property or an inherent attribute thereof, which from the constitutional point of view is the same thing.

This further observation of Mr. Justice Sutherland is also of interest. He said (p. 495):

> "The power to regulate property, services or business can be evoked only under special circumstances; and it does not follow that because the power may exist to regulate in some particulars, it exists to regulate in others or in all."

Similarly it may be said that while Congress may excise the sale of specified manufactured articles before they reach the hands of the ultimate consumer, Congress may not, without laying direct taxes, require the payment of taxes on all sales of any or all property.

In *Blodgett* v. *Holden*, 11 Fed. (2d) 180, Judge Reymond, sitting as the District Court for the Western District of Michigan, reached the conclusion that an indirect tax might be laid upon the transfer of property by gift, although he recognized that if the tax were imposed "because of the general ownership of property," it would be a direct tax. He conceded that the "incidence of property, such as the rights to possess, sell, pledge, keep or enjoy," are "natural rights incident to ownership of property", and if the tax were imposed on such a right, it would be a direct tax.

In reaching his conclusion that the tax, being upon the transfer, is not upon property, he indulges in a somewhat extraordinary bit of reasoning. After stating that the tax is imposed only after the actual transfer, and that a gift can be consummated only by actual delivery, referring to the Act in question he says at page 186:

> "It levies a tax upon the transfer after the title and ownership of the donor has ceased by reason of a gift. Unless this distinction is kept clearly in view, the mind is constantly tempted to revert to the thought that the tax is upon the *right* to transfer by gift. If it were the latter, the tax could only be imposed during the actual ownership, because the right to transfer terminates by the transfer itself."

The law by its terms taxes the donor on the transfer of the property by gift, but as will be seen, Judge Raymond argues that the tax is not imposed until after the transfer has been completed. Therefore, he says the tax cannot be a direct tax upon the right of gift, because at the time the tax attaches, the donor no longer has the ownership of the property from which the right springs. The same argument might be applied to all dispositions of property either by sale, gift, distribution or relinquishment. If consistent, Judge Raymond would still argue that any tax imposed on the disposal must be indirect,

because the right of disposition in the owner had ceased by reason of its exercise. This, notwithstanding the fact that he recognized that such *right* of disposition is inherent in property and ownership and that the taxation of such *right* would be direct. But if the right of transfer has ceased before the tax attaches, then also has the transfer. The right does not cease until the transfer has been completed and has ceased.

If the donor have no other property, then the tax is made to apply to the property transferred. In such case it would clearly be, even upon Judge Raymond's hypothesis, upon the property itself.

However, the whole argument is fallacious, for it is based upon a false premise, i. e. that the tax does not attach until completion of the transfer.

If the tax be upon the transfer, then it must attach simultaneously, that is, from the moment the transfer starts until it is completed. During that whole time, the right of transfer must exist, that is to say, the right of transfer exists coincidently with the transfer itself and the tax attaches coincidently with the transfer.

Even if the argument were correct in fact, which it is not, it would be utterly unconvincing. Such fine-spun theories have no place in so practical a subject as taxation. As stated by Mr. Justice McReynolds in *Nichols* v. *Coolidge*, *supra*,

> "Taxes are very real things and statutes imposing them are estimated by practical results."

The actual practical result of the imposition of the tax under consideration is to place a burden upon, and directly restrict, the rights inherent in property to use, enjoy or dispose of an object of ownership in such manner as the owner thereof may wish, either by giving it to or sharing it with others.

The only support Judge Raymond could find for such a sheer-spun theory are certain remarks of Mr. Justice White in *Billings* v. *The United States, supra.* But Judge White was not speaking of the use of property in general, but the special use of a specific article. As stated in the opinion of Judge Hand in the District Court below that case

> "* * * is not in point, for the *use* of a yacht for pleasure was not only distinguished in the Supreme Court in the opinion of the Chief Justice from the sum total of the rights of disposition and ownership of the yacht, but it may perhaps also be said that many rights in ships have historically been treated as excisable."

The argument that a distinction can be drawn between the *right* of gift and the *transfer* of property by gift is a reversion to the view so frowned upon by the Supreme Court in the Pollock and other cases, that the form and not the substance should be considered in determining the character of a tax. The repeated expressions of our courts upon this subject make it clear that such a view no longer has any place in the consideration of tax legislation.

As stated by Mr. Justice Brandies, in *Dawson* v. *Kentucky Distilleries, supra*, page 292:

> "The name by which the tax is described in the statute is, of course, immaterial. Its character must be determined by its incidence."

He later said, speaking of the tax there under consideration: "It cannot be made an occupation or license tax by calling it so."

Again, in *United States* v. *Phellis* (1921) 257 U. S. 156, 168, the court said:

> "We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder."

6. The gift tax cannot be supported as indirect by the application of any of those tests which are sometimes considered by the courts.

(a) The test of whether the tax is an absolute and unavoidable demand.

In dealing with the question of whether a given tax is or is not direct, the courts have often raised the query, does this tax represent an absolute and unavoidable demand upon the taxpayer. If that question must be answered in the affirmative, then the courts have declared the tax to be direct.

However, it does not necessarily follow that the converse of the proposition is correct. We subscribe to the proposition that if a tax represents an absolute and unavoidable demand, it is direct, but we doubt whether it may be said that if the tax is not an absolute and unavoidable demand it is indirect.

However, we believe that within the proper construction of the rule, the gift tax does constitute an absolute and unavoidable demand. To illustrate, it is now established that a tax upon the income from property either real or personal is a direct tax. It is an absolute and unavoidable demand on the taxpayer if he receives his income, that is, if he exercises the right to do so. However, he might refuse to receive the income and, therefore, escape the tax, but that is not the sense in which this phrase "absolute and unavoidable demand" is used.

Again it has been determined that the withdrawal of whiskey from a bonded warehouse, being a tax on the right to take possession of one's own property, is a direct tax. It is clear that the taxpayer may decline to take possession of his property and thereby avoid the payment of the tax.

It will be observed, however, in those instances that the only way in which the owner of the property might avoid the payment of the tax would be to refuse to exercise rights inherent in property.

Similarly it may be said that a man need not dispose of his property, that he need not give it away and, therefore, he may avoid the incurring of the gift tax, but that would be simply because he declined to exercise an inherent right of property. In each of these cases it appears that the exercise of the inherent right of property brings with it an absolute and unavoidable demand upon the taxpayer for the payment of the tax.

Again, we must draw the distinction between a tax imposed on the exercise of a right inherent in property and a tax upon the exercise of a privilege, or upon the doing of an act in the particular manner specified in the taxing act. It is not necessary for people to do business through the medium of a corporation. A tax upon a corporation, therefore, does not constitute an absolute and unavoidable demand, for the business may be done through another medium.

Similarly it is not necessary for the owner of merchandise to sell his goods on an exchange. He may sell his goods in some other place, and thus avoid the payment of a tax imposed upon the sale of goods at an exchange.

(b) There is no historical basis for declaring the tax in question to be an excise or indirect tax.

In considering various taxes which have been imposed by Congress, the courts have not infrequently referred to the historical antecedents for the purpose of determining whether certain taxes should be considered as direct or indirect, as those terms are used in the Constitution. Not infrequently such taxes have been sustained as indirect on the ground that similar taxes had been laid and had been treated and considered as excise taxes prior to the adoption of the Constitution.

Thus in *Patton* v. *Brady*, 184 U. S. 608, 618, in considering a tax laid upon tobacco and snuff manufactured and sold, Mr. Justice Brewer quoted with approval a

statement of one of the counsel, that "tobacco was supposed to be one of the subjects to which excise was applied in England when the Constitution was framed."

The historical background was also one of the chief grounds upon which the estate and inheritance taxes imposed by Congress have been sustained as being indirect taxes. In *New York Trust Company* v. *Eisner*, 256 U. S. 345, 349, Mr. Justice Holmes referred to this as being conclusive on the proposition that the estate tax should properly be regarded as indirect. An attempt was made to distinguish between a tax on the privilege of transmitting, and a tax on the privilege of receiving. He said:

> "But that matter also is disposed of by *Knowlton* v. *Moore*, not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.' 178 U. S. 81-83."

And then epigrammatically he continued:

> *"Upon this point a page of history is worth a volume of logic."*

But there is no page of history to which the court may turn as justifying the action of Congress in imposing as indirect a tax on the gift of property. On the contrary, the pages of history show that at no time prior to the adoption of the act in question was a tax ever laid upon a gift *inter vivos* or the transfer of property by gift, either in this country or in any other English speaking country. This tax is a complete innovation, and we take the liberty of asserting was one of which the framers of our Constitution never conceived.

Therefore, insofar as an analogy because of the historical antecedents of a death duty is concerned, we may dismiss it from consideration, because a gift tax has no statutory or common law parents upon which to found its legitimacy.

Judge Learned Hand in the *McNair* v. *Anderson* case, in the court below indicated that the novelty of the tax did not affect its constitutionality. This we concede. But if the tax is novel, and cannot be supported merely by reason of its historical antecedents prior to the adoption of the Constitution, then it must be tested by its practical results and actual effect.

The gift tax does not fall within indirect taxes as that term is defined by economists.

In the brief of counsel in *Blodgett* v. *Holden*, the definitions of a number of economists are set out. In order to avoid repeating those definitions, we shall allude only to the conception of Adam Smith in his "Wealth of Nations", which was extant at the time of the adoption of the Constitution, in which he lays down as a test the shiftability of the tax, and distinguishes between direct and indirect taxes in that direct taxes are assessed on persons according to property or income, and indirect taxes on expenses or consumption, and Kickerman in *Systema de Disciplina Politica*, published in 1607, wrote that "indirect taxes are those which the State receives from artifices that it tolerates."

The tests of economists are consonant with the tests of the courts, and neither of them would uphold such a tax as the one here in question as being indirect.

8. The gift tax is not analogous to inheritance and estate taxes nor taxes on gifts intended to take effect in possession or enjoyment at or after the death of the donor, or made in contemplation of death, nor may it be defended as ancillary to the estate tax.

As heretofore pointed out, inheritance and estate taxes have been considered by the courts to be proper excise taxes on the ground that no one has the natural right to acquire property by will or descent and, therefore, when property is transmitted by will or descent, a privilege granted by the sovereign power is exercised which properly may be made the subject of an indirect tax. Moreover, as Mr. Justice Holmes pointed out in *New York Trust Company* v. *Eisner*, *supra*, historically they have been treated as excise or indirect taxes.

As stated by this court in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 288, referring to the cases in which inheritance tax statutes have been sustained:

> "They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."

The right of the Federal government to assess an excise tax upon the exercise of such a privilege was sustained in *Knowlton* v. *Moore*, 178 U. S. 41, and again, in *New York Trust Company* v. *Eisner*, *supra*, where Mr. Justice Holmes pointed out that, historically, such inheritance taxes have always been treated as excise or indirect taxes, and emphasized this as the most potent argument upon which the taxes should be upheld.

As stated by Chief Justice White, in *Knowlton* v. *Moore*, death is the generating source of all inheritance taxes, and this may be said of such taxes as have some

times been regarded as ancillary to inheritance tax statutes, i. e., taxes on gifts to take effect in possession or enjoyment at or after death, and taxes on gifts made in contemplation of death. In each case the central idea upon which the tax is based is the transmission of property at death, or the substantial equivalent thereof, the transfer of property by one in expectation of impending death. It may be said of gifts made in contemplation of death, that death is the generating source or cause, for, as the phrase "in contemplation of death" is interpreted, the statutes imposing such taxes are intended to reach only such gifts as are made because of the realization by the donor of impending death.

A tax upon a gift in contemplation of death, or upon a transfer to take effect in possession or enjoyment at or after death, is neither in theory nor reality a tax upon gifts *inter vivos*, but is a death tax based upon death as the generating source.

In *Keeney* v. *New York*, 222 U. S. 525, this court passed upon the propriety of a tax upon the transfer of property to take effect in possession or enjoyment upon the death of the donor. Mr. Justice Lamar distinguished between such transfers and other gifts of property, saying at page 533:

> "There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes."

While there may be grave doubt concerning the power of the Federal government to impose taxes upon gifts

made in contemplation of death, the theory upon which those taxes are imposed is to make effective the collection of inheritance taxes at death, and to prevent what otherwise might be a possible method of evasion.

The power of the Federal government to impose such taxes has never been directly passed upon by this court, but when the state statutes have been considered by the state courts the theory upon which they have been upheld, is that they are ancillary to the death taxes.

These statutes are always classed as inheritance tax statutes and have been sustained as such. The statute here in question has no relation to inheritance, or the transfer of property by death, or transfers made to evade such inheritance taxes, nor does it attempt to tax the transfer or creation of artificial estates in property. It purports to tax all gifts of property, without regard to the motive prompting the gift, or the occasion for it, or the manner in which the gift is consummated, or the character of the property which is the subject of the gift. It is a tax upon one of the essential elements of property, and bears none of the characteristics of those taxes generally classified as inheritance taxes which have been sustained by the courts.

Judge Learned Hand, in his concurring opinion in *McNeir* v. *Anderson*, in the Circuit Court, *supra*, page 974, referring to the changes in the estate tax law and to the gift tax, said:

> "we must assume, I think, that Congress supposed these to be in pari materia and progressively an execution of the main design."

However, it has been made clear by this court that neither the States nor the Federal Government may enact laws imposing taxes beyond their jurisdiction and claim, as a valid excuse, that the statutes are designed to assist in the collection of other taxes which may lawfully be assessed. Thus in *Schlesinger* v. *Wisconsin*, 270

U. S. 230, this court condemned the provisions of the Wisconsin inheritance tax law, which attempted to raise an irrebuttable presumption that any gift of a material part of the donor's estate, made within six years prior to his death, was made by the donor in contemplation of death, and thus subject to the inheritance tax. Mr. Justice McReynolds said, page 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes * * *. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

If as ancillary to inheritance taxes, as an aid to the collection thereof, and to prevent the evasion of such taxes, the State of Wisconsin may not raise an irrebuttable presumption that a gift, made within six years of the death of the donor, was made in contemplation of his death, then it would seem to follow inevitably that Congress may not impose a tax on all gifts at any time made by a donor, without regard to his motive or the object which the donor expects to achieve thereby, and defend such a tax on the claim that it is ancillary to the general design of the estate tax.

"Under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them." *Nichols* v. *Coolidge*, *supra*.

9. If the purpose and effect of the gift tax is to compel, subject to the imposition of a penalty tax, the retention intact of large estates, in order that neither the higher rates of the income tax nor the Federal Estate Tax may be avoided, then the gift tax must be considered a direct tax.

In *Blodgett* v. *Holden*, 11 Fed. (2d) 180, Judge Raymond argues that the gift tax is justified on the ground that it was imposed to prevent the avoidance of estate and income taxes. At page 186 he said that "the object of the gift tax undoubtedly was to make effective the provisions of the income tax and the estate tax in their application to large estates." Again he said, page 188: "its" (referring to the gift tax) "substantial object was to prevent the widespread evasion of the estate tax and the high surtaxes of the income tax law * * * "

Let us test this argument by the practical and natural effect of the tax, postulated upon this purpose. If the income tax as imposed upon income from property is a direct tax, and one may not avoid the income tax except upon the penalty of another tax imposed to prevent the avoidance thereof, then without regard to the election of the taxpayer, he must yield a portion of his property to the government. Either the income (a direct) tax will be imposed, or a gift tax with high graduated rates will be imposed. Upon whom or upon what? Either upon the property or the person. In either event, the tax is an unavoidable demand, is compulsorily demanded —and thus direct.

But, as Judge Raymond argues, the gift tax is not only a corollary of the income tax but is also a hand maid of the Federal estate tax. Thus in life or death the government will demand a contribution of the accumulated wealth. If one does not break up his wealth by giving it away, he shall pay the Federal death duty. If he does, he shall pay the gift tax. If he shall permit his property to produce, he shall be taxed at high income

tax rates, and also at his death upon his accumulated wealth. If it be not productive, nevertheless, the death duty shall be imposed. If he rebel at being driven upon the shores of the income or estate taxes, then he faces, upon the open seas, the storm and penalty of the gift tax.

Thus, without cavil or escape, the property is made subject to the tax. Unless the fortune be retained that death duties may be imposed, it, nevertheless, is taxed. Unless it be retained intact, so that the high income surtaxes may be applied to its earnings, it, nevertheless, is taxed. Could certainty be more certain or directness more direct.

Congress has, in effect, said to the owners of large wealth: We demand a portion of that wealth, and the more any has accumulated, the greater portion thereof we demand. We require that you shall retain your wealth intact, so that we may secure the large portion of the income which the Federal government will collect if your fortune is large. We are not satisfied to simply collect that portion that would be payable to the government as a tax upon the income, if it were distributed ratably among a large number of persons. We wish to secure the largest portion possible and, therefore, wish you to retain it and to collect the income therefrom. If you attempt to split up your fortune, you must then pay part of your capital to the Federal government. The amount of such payment will depend upon the amount that you attempt to distribute in any one year.

Moreover, you may not avoid so contributing a portion of your wealth to the Federal government by selling any part of it for less than its worth, for if you do so, the difference between the amount for which you sell it, and the amount which you receive in return, will be treated as a gift, and taxed as such. When you dispose of any of your property, you must be sure to receive the full value of it. If you make a mistake and lose part of

your fortune by reason thereof, you must pay a tax to the Federal government as if you had intended to make a gift of that portion which you so lose.

Judge Raymond states that this was the purpose of Congress. He cites the debates in Congress to support his view. We may assume that his statement reflects the position of the government. Can one conceive of a more direct and absolute demand on the part of the Federal government than the tax so sought to be imposed?

Moreover, whether this be viewed as an attempt on the part of Congress to prevent the splitting up of large fortunes, and the consequent diminution of the income tax which would be collected by reason thereof, or to prevent the splitting up of fortunes by persons not in contemplation of death, as that phrase is used in the statute, but to relieve the objects of their bounty from the burden of the estate tax should they postpone the transfer thereof until their death, it nevertheless represents an attempt on the part of Congress to regulate men in the disposition of their property. There is nothing illegal or improper in a person distributing his property while he is living among the objects of his bounty, and it matters not that he may be prompted to do so by reason of high income surtaxes or high inheritance taxes. He has a right to distribute his property as he will and when he will. The reason why Congress may have wished to thus regulate the disposition of property by owners of large wealth, and coerce them into retaining that wealth is not of importance. If that was the purpose of Congress, as asserted by the government, Congress was attempting something beyond its power, and the act must be condemned. Judge Learned Hand, in *McNeir* v. *Anderson*, apparently recognized that this was the purpose of Congress, and defended it, saying:

> "This is not to use the power of taxation for an ulterior purpose, as in the Child Labor Cases,

259 U. S. 20; 42 S. Ct. 449; 66 L. ed. 817, and the like."

The ultimate object which Congress sought to accomplish through regulating the disposition of property is not of importance. If it is conceded, that Congress, through the gift tax, did attempt to prevent persons from splitting up their accumulated wealth, and that seems to be the argument advanced by the government, then the act must be condemned as an attempt on the part of Congress to do that which is beyond its constitutional powers. In *The Child Labor Cases, Bailey* v. *Drexel Furniture Company*, (1922) 259 U. S. 20; *Hill* v. *Wallace*, (1922) 259 U. S. 44, and *Trusler* v. *Crooks*, (1926) 269 U. S. 475, the Supreme Court held that Congress may not regulate by means of taxation what it may not control by regulatory statutes. Certainly Congress has no power to regulate or control the dispositions of property by gift, nor has it any right to compel the owners of property to keep their estates intact. The object which Congress sought in thus attempting to regulate indirectly the disposition of large fortunes is not the determining factor. The attempt to regulate indirectly through taxation what it may not regulate directly is futile, and the act void.

POINT IV.

Even if the tax is held to be indirect it is, nevertheless, void because:

First: The statute is violative of the fifth amendment in that the attempted classification is capricious and unreasonable.

Second: It is not uniform throughout the United States as required by Article I, Section 8, of the Constitution.

Third: The law is so indefinite and uncertain in its operation that it may not be enforced.

The gift tax statute is discriminatory, arbitrary and capricious.

The statute provides that gifts up to $500. to any one individual are not subject to tax. A, if he give $1,000. each to fifty-one different people, is subject to tax. B, is exempt from such tax if he give $51,000. to one hundred and two different people by giving $500. to each. A, if he give one person $60,000. is subjected to a tax, and B may give $500. to a million people and be relieved of the tax. Such a classification is not based upon "some difference which bears a just and proper relation to the attempted classification." (See *Magoun* v. *Ill. Trust & Savings Bank* (1898), 170 U. S. 283, 42 L. Ed. 1037; also *Gulf Colo. & Santa Fe Ry. Co.* v. *Ellis* (1897) 165 U. S. 150, 41 L. Ed. 666).

The tax is not upon the donee. It is upon the donor. It undertakes to classify the gifts of the donor. To classify one gift of a million dollars by one donor, and to tax him, and to give another classification to another gift of one million dollars by another donor, and place him in another classification, does not come within the pur

view of the language used in the two cases above cited (the *Ellis* case and the *Magoun* case), or within the definition given by Mr. Justice Day, in *Southern Railway Co.* v. *Greene* (1910), 216 U. S. 400, 417, 54 L. Ed. 536, 541.

The Supreme Court upheld, in *Magoun* v. *Illinois Trust & Savings Bank* (1898), 170 U. S. 283, the graduated rates upon inheritance taxes. The tax there in question was a legacy tax, imposed upon the recipients of the property and measured by the amount received. But this is not the measurement of the gift tax in its attempted classification or progressive rates.

The statute in suit does not tax the donee on the amount he receives, with progressive rates upon that amount, but taxes the donor, and not upon the amount that he gives as a whole, during the year, but upon the aggregate amount of certain gifts, that is, as stated above, one man may give a million dollars and be free of the tax, another may give a million dollars and be subjected to a very large tax. This basis of classification is entirely different from the graduated rates of the present Federal Estate Tax act. Further than that, the classification or attempted classification, in the gift tax is similar to that that was held not tenable, and indicated, if tenable, to be unconstitutional by the United States Supreme Court in *Knowlton* v. *Moore*, 178 U. S. 41. In that case, the Government first contended that the statute was a tax upon the recipients of the property measured by the amount of the property left by the decedent. The Court held that this could not be done, and Mr. Justice White said, at page 76:

> "The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and

> separate thing. But this is equivalent to saying that the principal underlying the asserted interpretation is that the house of A, which is only worth $1000., may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundred fold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated * * *. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other."

The court so construed the law, in order that the tax might be held constitutional, that the measure of the tax was the amount received, and not the value of the estate left by the decedent. The necessary inference from such a forced construction of the statute, is that a gift tax imposed upon the donor and measured not upon the total amount of his gifts, but the several amounts received by the certain beneficiaries, would come within the condemnation referred to by Mr. Justice White. He says, on page 77, relative to the tax on one's property, based upon the value of another's property, that

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The gift tax is not uniform within the meaning of that term is used in the Constitution with relation to indirect taxes.

Article I, Section 8 of the Constitution of the United es provides that all duties, imposts and excises shall uniform throughout the United States. It has been eatedly stated by the courts that this requires geo- phical uniformity, that is, that if an excise tax is im- d upon the manufacture and sale of tobacco, it is aterial where the tobacco is manufactured or sold. tax is laid on persons manufacturing and selling cco in New York, this same tax must be imposed citizens doing the same act in Pennsylvania. We then say that the meaning of this section of the stitution is that all citizens of the United States, g the same act, must be uniformly taxed. We submit the act in question violates this provision of the stitution.

This tax act, for the first time, draws a distinction sidence, and taxes one citizen of the United States different basis than another citizen of the United es. It makes a classification based upon residence It is true that the Federal Estate Tax, as a tax an estate, is based upon residence of its previous r, the decedent. But the Federal Estate Tax is property located within the United States, and hav- situs here, passing by the laws of the several states. government has jurisdiction of the *res*. And all ees, devisees, heirs and distributees, regardless of ence, are treated alike. A citizen of the United es having property in Africa, or in South America, r real or personal, under the provisions of Section f the Revenue Act of 1924, would be subject to a tax its gift. This is the plain letter of the law. Yet government has no jurisdiction over the property. her citizen of the United States living in England, ng similar property, similarly located, would not be

subject to the tax. A non-resident citizen could take all of his personal property out of the United States, make a gift thereof, and thus free himself of the burden of the tax. A resident citizen, however, is treated differently. A citizen of the United States, living within the United States, is granted a $50,000 exemption—a citizen living without the United States, but yielding allegiance to the United States, and subject to all of its tax laws (See *United States* v. *Bennett* (1914), 232 U. S. 299, is not allowed the exemption.

Article I, Section 8 of the Constitution provides that all excises, imposts and duties must be uniform throughout the United States. When one speaks of the persons taxed, the reference is to the citizens of this country. The tax is not uniform when it permits the citizen, non-resident, to give away his property outside the United States free of the tax, and to impose the tax upon the citizen who resides here, regardless of the situs of the property donated by him.

Irrespective of the requirement of the Constitution that indirect taxes shall be uniformly laid, we also submit that the differentiation between citizens of the United States living in this country and abroad, is capricious and arbitrary, and violates the Fifth Amendment to the Constitution.

The law is so indefinite and uncertain in its operation that it cannot be enforced.

Section 320 provides:

> "If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by Sec-

tion 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year."

It is thus by the provision of this section of the law, that the duty is imposed upon the Treasury Department, that is, the United States, to investigate every sale or exchange of property occurring throughout the United States if made by a non-resident of property having a situs within the United States, and throughout the world, if made by a resident of the United States. In fact, the Government must have the value of the property exchanged or sold appraised by Government employes, or agents, wherever the location of the property, and under whatever conditions the property may be sold or exchanged, in order to determine whether the fair market value of that property was received in the exchange, or upon the sale. The Secretary of the Treasury, in his appearance before the Committee on Ways and Means of Congress on October 19, 1925, relative to the gift tax and particularly in respect to Section 320 of the law, said that:

> "Nothing illustrates as well the difficulty of preventing the avoidance of excessive taxation by statutory enactment as does this particular section of the law. When property is sold or exchanged, the difference between the value of the property and what is received is considered a gift. So if a seller makes a bad bargain, he must not only pay his loss, but he must pay a gift tax on his loss, and the more the loss the more tax he has to pay." (Reported in New York Times, Tuesday, October 20, 1925.)

The iniquity of this provision is that no man may know, except in some isolated articles of commerce, such as stock, grain or cotton sold upon the exchanges, the actual fair market value of the property which he elects

to barter, exchange or sell. Even upon the exchanges there may be during the day such a fluctuation of values as to render the giver or seller subject to an arbitrary determination of the government's official as to the fair market value of the property exchanged or sold during that day.

It cannot be the genius of this country to build in Washington some great centralized bureaucracy to pass upon every business transaction, to fix a value at which tradesmen and business people may sell or negotiate, and to hamper the easy and free flow of industry and commerce. A tax that has this resultant consequence, regardless of any specific provision of the Constitution prohibiting or granting it, is an interference with business, with property rights, with the right of man to treat with man, and is thus a violation of the powers reserved to the states by the 10th Amendment of the Constitution of the United States.

But the statute is also faulty in that the word "property" in Section 319, apparently includes the gift of money. In Section 320 the word "property" excludes the gift of money.

The statute also provides that the tax shall be paid upon the 15th day of such calendar year, that is, the calendar year for which the return is made. This is impossible. One cannot tell by the 15th day of March what one will do on the 31st day of December of the same year. In substance the statute fixes no definite time for the payment of the tax, or for reporting the gift. The statute says the 15th day of March, but does not say the 15th day of March of what year. If the language is strictly construed it would mean (see Section 323) the 15th day of March of the same year during which the gifts and contributions were made. This, of course, would be not only impossible but ridiculous.

Section 324 of the law says that

> "The tax imposed by Section 319 shall be paid by the donor on or before the 15th day of March, and shall be *assessed collected, and paid*, in the same manner, and subject, in so far as applicable, to the same provisions of the law as the tax imposed by Section 301." (Italics ours.)

Section 301 is a tax imposed against an executor or administrator, or the estate of a decedent, and is payable one year after death. A taxing statute must not only fix with some degree of certainty the things or acts subject to the tax, but must definitely fix the time of the payment, and the obligation for the payment. (See *U. S.* v. *Godel*, (1914) 232 U. S. 293, 58 L. Ed. 610).

A tax statute is inherently faulty and invalid that fixes no time of payment, or that leaves the time of payment so in doubt. If we read Section 323, in one sense, it means a tax must be paid on the 15th day of March of the year during which the contributions and gifts are made. Section 324, in making reference to Section 301, makes the time for payment of the gift tax all the more indefinite because the tax in Section 301 is collected from an executor of an estate, and is not payable until a year after the death of the donor. It may mean that the statute intended that the gift tax shall not be paid until the donor has died. If this be the construction, then the collector should have returned the tax already paid by the donor, because he is still alive.

We submit, therefore, that the classification is arbitrary and capricious, that it taxes one citizen of the United States differently from another citizen; that it permits one citizen to give away unlimited amounts of money, and another citizen to be subjected to the tax if he give away only a relatively small amount of money,

and compels the Federal Government, in order to properly enforce the whole of the Act, to inspect every business transaction wherein an exchange, or barter, or sale of property is made, at any time, whether by a merchant, a manufacturer, a tradesman, or an individual, in order to ascertain whether or not the fair market value of the property has been received on the exchange or sale. Any classification, or any tax law, whether national or state, that undertakes to regulate, in the most minute detail, the operation of all business transactions, and to permit a government official to be the deciding factor as to the propriety of that business negotiation or commercial enterprise, or as to the adequacy of consideration passing therefor, is inherently invalid, and should be declared null and void, because it is a capricious, whimsical and arbitrary interference with the rights of man, and the rights of property, a jurisdiction that is exclusively the states', and beyond the power of the Congress.

(See *Child Labor Tax case*, 259 U. S. 20; *Hill* v. *Wallace*, 259 U. S. 44; *U. S.* v. *Daugherty*, 269 U. S. 360; *Trusler* v. *Crooks* (1926) 269 U. S. 475.

No provision is made in the law for the assessment of the tax upon a gift in trust, such as that made by Mr McNeir. By the terms of the trust instrument, the property was given to a trustee to hold certain portions thereof, during the lives of certain persons, and with a remainder over in part upon the happening of certain contingencies to an educational institution, which is exempt from the tax under the letter of the law. Until the happening of the event which will determine whether or not any portion of the property so transferred will go to an exempt corporation, it is not practicable under the statute to say with definiteness whether or not the transfer made by George McNeir is or is not subject to the tax.

We endorse the observation of the President of the United States that "A Gift Tax is a further invasion of the rights of the citizen, both unusual in nature and of doubtful legality." (*) We go further and say that the tax is illegal.

The questions certified by the United States Circuit Court of Appeals for the Sixth Circuit should not be answered because the Gift Tax should be construed as not applying to gifts completed prior to the effective date of the Act, but if the said Gift Tax Statute be construed as applying to such gifts, then the said questions should be answered in the affirmative.

Respectfully submitted,

C. ALEXANDER CAPRON,
RUSSELL L. BRADFORD,
Amici Curiae.

(*) From statement concerning the Gift Tax by President Calvin Coolidge, made at the time of signing the Revenue Act of 1924, on June 2nd, 1924

Office Supreme Court, U. S.
FILED
OCT 2 1927
CHARLES ELMORE CROPLEY
CLERK

UNITED STATES OF AMERICA

The Supreme Court

No. 154 October Term, 1927.

JOHN W. BLODGETT, Plaintiff-in-Error,
vs.
CHARLES HOLDEN, as U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant-in-Error.

On Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

MOTION WITH NOTICE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF.

DANIEL J. KENEFICK,
LYMAN M. BASS.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	Page
tion for Leave to File Brief as *Amici Curiae*	1
Tax, Applied Retroactively to Past Transactions, Violates the Fifth Amendment	5
ition	8

CASES CITED.

vab v. Doyle, 258 U. S., 529	5
y v. Wardell, 258 U. S., 542	4
hols v. Coolidge, Adv. Op. 6/15/27, 797	5

UNITED STATES OF AMERICA.

The Supreme Court

October Term, A. D. 1927.

JOHN W. BLODGETT, Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant-in-Error.

Come now, DANIEL J. KENEFICK and LYMAN M. BASS, and move this Honorable Court for leave to file the annexed brief herein as *amici curiae*.

DANIEL J. KENEFICK,
LYMAN M. BASS,
Office & P. O. Address,
Marine Trust Building,
237 Main Street,
Buffalo, New York.

UNITED STATES OF AMERICA
THE SUPREME COURT.

No. 154 October Term, 1927.

JOHN W. BLODGETT, Plaintiff in Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan, Defendant in Error.

The facts in the instant case are, in all essential respects, similar to the facts in the case of Helen S. Schmidt v. United States of America now pending in the Court of Claims, wherein the claimant is represented by the firm of Kenefick, Cooke, Mitchell & Bass, attorneys, of which the undersigned are members. The facts in that case are fully and clearly stated in the petition which was filed in the Court of Claims on April 25th, 1927, a true and correct copy of which is hereto annexed and made a part hereof.

This petition discloses that Helen S. Schmidt, on the 17th day of May, 1924, transferred to each of her four children, Hans Schmidt, Jr., Walter S. Schmidt, Mary Louise Schmidt and Elsie Schmidt Klopp, in consideration of natural love and affection, seven thousand (7,000) shares of the common stock of The Niagara Falls Power Company. On the date of the gift, the market value of the shares of stock so transferred, to wit, twenty-eight thousand (28,000) shares was One million, three hundred and nine thousand dollars ($1,309,000.00).

The Revenue Act of 1924, which imposed the Gift Tax, was enacted June 2, 1924. Pursuant to its provisions, Helen S. Schmidt filed with the Collector of Internal Revenue, at Buffalo, N. Y., her return for the calendar year of 1924, in which she reported the gifts above described and duly paid, under protest, to the said Collector, the amount of the gift tax assessed, to wit, One hundred fourteen thousand, eight hundred and fifty dollars ($114,850.00), together with accrued interest amounting in all to one hundred sixteen thousand twenty-five dollars and thirty cents ($116,025.30).

Thereafter the said Helen S. Schmidt, duly filed with the said Collector at Buffalo, N. Y., a claim for refund for the amount of the tax so paid, which claim was rejected for the full amount thereof. Subsequently the rates prescribed in Section 319 of the Revenue Act of 1924 were modified and reduced by the provisions of Section 324 of the Revenue Act of 1926, which was made applicable to returns for Gift Taxes for the calendar years of 1924 and 1925, and in accordance therewith, the said Helen S. Schmidt received a refund of Thirty-seven thousand, eight hundred seventy-six dollars and Twenty-seven cents ($37,876.27) of the amount of the tax so paid by her leaving a balance of Seventy-eight thousand, one hundred forty-nine dollars and Three cents ($78,149.03), with interest, the recovery of which is sought in the action instituted by her against the United States in the Court of Claims.

The only distinguishing feature between the two cases is that the gift in the case at bar consisted of bonds and obligations of one state and of political subdivisions of other states, while the gift in the case of Helen S. Schmidt v. United States of America, consisted of stock of a private corporation. The case at issue therefore, presents all of

the questions which might possibly be raised on appeal in the case of Helen S. Schmidt v. United States of America and includes also the question as to whether or not the tax violates the unwritten prohibition of the Constitution that bonds of the various states and political subdivisions thereof are not subject to tax by Congress.

All of the questions of law involved in this appeal are very fully and carefully covered in the brief of the plaintiff in-error and other briefs filed herein. We therefore deem it unnecessary again to review at length the cases and authorities which are pertinent and applicable to the questions herein presented for determination by this court. We do, however, wish to refer to two recent cases decided by this court which we submit clearly establish the invalidity and unconstitutionality of this particular tax, especially when it is applied as in this case to transfers completed before the effective date of the Act.

In the case of *Levy v. Wardell*, 258 U. S., 542, the questions at issue were the proper construction and the validity of the provisions of the Federal Estate Law of September 8th, 1916. Pursuant to its provisions, the Government sought to sustain a tax based in part upon certain transfers made by a decedent long before the Revenue Act of 1916 was passed. This court held that the Federal Estate Tax Law of 1916, properly construed, was not applicable because the transfers were not made in contemplation of death and also because the act did not apply to transactions completed before its effective date. The reasons for this decision, which differed slightly from those given in the case of Shwab v. Doyle, 258 U. S., 529, because in that case the transfer was in contemplation of death, are stated in the opinion in this case which reads in part as follows, page 544:

"At the time of the transfers there was no law of the State of California imposing any transfer or inheritance tax, nor was there a law of the United States to that effect, and all of the transfers were intended to take effect in possession and enjoyment upon their date. The act of Congress, therefore, should not be construed to be retroactive, and, if so construed, was in violation of the Constitution of the United States in that it would take the property of plaintiffs without due process of law in violation of the Fifth Amendment, and would not be, besides, a transfer tax but would be a direct tax thereon in violation of Article I, Section 9, subdivision 4 of the Constitution of the United States, because not laid in proper relation to census or enumeration as therein provided."

In the Revenue Act of February 24th, 1919, Congress sought to overcome the effect of the decision in the case of *Levy v. Wardell*, and also that of its companion case, *Shwab v. Doyle*, 258 U. S. 529, by adding to the sections referring to estate taxes, words clearly indicating the intention that the Act should cover all transfers made in contemplation of death whether or not they were completed before or after the date that the Act was passed. In the case of *Nichols v. Coolidge*, decided May 31st, 1927, Adv. Op. June 15, 1927, page 797, it was held that section 402 (c) of the Act of February 24, 1919, in so far as it required the inclusion in the gross estate of the value of the property transferred by a decedent prior to its passage, was so arbitrary and capricious as to be confiscatory and to offend the Fifth Amendment. The opinion of the court written by Mr. Justice McReynolds reads in part as follows:

"This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to

amount to confiscation and offend the Fifth Amendment. Brushaber v. Union Pacific R. R. Co., 240 U. S., 1, 24; Barclay & Co. v. Edwards, 267 U. S. 442, 450. See also Knowlton v. Moore, 178 U. S. 41, 77. And we must conclude that Section 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider."

We respectfully submit that if the provisions of the Revenue Act of 1924, which imposed the gift tax, have been properly and correctly construed by the government to apply retroactively that they are invalid and unconstitutional under the decisions above cited. The transactions are identical in every respect. In each instance there was an absolute gift *inter vivos* which was made and completed long before the tax statute was enacted, and neither transfer was made in contemplation of death. It necessarily follows then that if Congress may not impose a retroactive excise tax on the transfers involved in the cases of *Nichols v. Coolidge* and *Levy v. Wardell*, it also may not levy a retroactive excise tax upon the transfer involved in the case at bar.

Respectfully submitted,

DANIEL J. KENEFICK,
LYMAN M. BASS.

To:

MARK NORRIS,
Counsel for Plaintiff-in-Error,
HON. JOHN G. SARGEANT,
Attorney-General of the United States,
Counsel for Defendant-in-Error.

PLEASE TAKE NOTICE, that the motion for leave to file the foregoing brief as *amici curiae* will be submitted to the Supreme Court of the United States, October 3rd, 1927, at 12:00 o'clock noon or as soon thereafter as counsel can be heard.

DANIEL J. KENEFICK,
LYMAN M. BASS,
Office & P. O. Address,
Marine Trust Building,
237 Main Street,
Buffalo, New York.

PETITION.

(Filed April 25, 1927.)

IN THE COURT OF CLAIMS.

HELEN S. SCHMIDT, *Plaintiff*, against UNITED STATES OF AMERICA, *Defendant*.	No. H-169.

To the Honorable, the Court of Claims:

The above named claimant, Helen S. Schmidt, by Kenefick, Cooke, Mitchell & Bass, her attorneys, respectfully shows to this honorable court, upon information and belief:

FIRST: That at all the times hereinafter mentioned claimant was and now is upwards of twenty-one (21) years of age, a citizen of the United States, and a resident of the City of Buffalo, County of Erie and State of New York.

SECOND: That heretofore and on or about the 17th day of May, 1924, claimant being then the lawful owner and holder of twenty-eight thousand (28,000) shares of the common stock of The Niagara Falls Power Company, a New York corporation with its principal office in the City of Niagara Falls, New York, duly assigned, transferred and set over to each of her four (4) children, Hans Schmidt, Jr., and Walter S. Schmidt of the said City of Buffalo, Marie Louise Schmidt of Derby, Erie County, New York, and Elsie Schmidt Klopp of the City of Niagara Falls, New

York, solely in consideration of natural love and affection, seven thousand (7,000) shares of said common stock of said The Niagara Falls Power Company.

THIRD: That on the day of said gift the market value of the common stock of said The Niagara Falls Power Company was Forty-six Dollars and Seventy-five cents ($46.75) per share, and the market value of the said twenty-eight thousand (28,000) shares given to her children as aforesaid, was one million, three hundred nine thousand dollars ($1,309,000.00).

FOURTH: That thereafter the Act of June 2, 1924, Ch. 234, 43 Stat. L. 253, known as the Revenue Act of 1924, was enacted by the Congress of the United States and signed by the President, and became effective on the 2d day of June, 1924; that under Title III, Part II, of said Act, a tax was imposed upon transfers by gift during the calendar year 1924 and each calendar year thereafter.

FIFTH: That thereafter and on the 12th day of March, 1925, the Collector of Internal Revenue at Buffalo, New York, duly granted claimant an extension of thirty (30) days from March 15, 1925, within which to file her return for federal gift tax for the calendar year 1924.

SIXTH: That thereafter and on the 14th day of April, 1925, claimant duly filed with the Collector of Internal Revenue at Buffalo, New York, her return for federal gift tax for the calendar year 1924, in which she duly reported the gifts made to her children as aforesaid, and duly paid to the said Collector the sum of one hundred fourteen thousand, eight hundred and fifty dollars ($114,850.00), being the amount of the gift tax assessed upon her said return.

Said return was filed and said tax was paid under due written protest.

SEVENTH: That thereafter the said Collector applied one thousand, one hundred forty-eight dollars and fifty cents ($1,148.50) of said payment to interest alleged to have accrued on said tax from March 15, 1925, the due date for filing the return and payment of the tax, to the date when said return was filed and said tax was paid; that thereafter and on or about the 18th day of June, 1925, an alleged deficiency by reason of the application of the said sum of one thousand, one hundred forty-eight dollars and fifty cents ($1,148.50) to the payment of interest as aforesaid, was assessed against claimant in the sum of one thousand, one hundred forty-eight dollars and fifty cents ($1,148.50) with interest thereon in the sum of twenty-six dollars and eighty cents ($26.80), amounting in all to the sum of one thousand, one hundred seventy-five dollars and thirty cents ($1,175.30), which said sum claimant paid to the said Collector under due written protest on the 25th day of June, 1925.

EIGHTH: That on the 16th day of April, 1925, claimant duly filed with the Collector at Buffalo a claim for refund of said tax for one hundred fourteen thousand, eight hundred and fifty dollars ($114,850.00) with interest, and thereafter and on the 27th day of July, 1925, said claim for refund was rejected by the Commissioner of Internal Revenue for the full amount thereof.

NINTH: That thereafter Title III, Part II, of the Revenue Act of 1924, was repealed as of January 1, 1926, by the Act of February 26, 1926, known as the "Revenue Act of 1926" and by Section 324 of said Revenue Act of 1926

the rates prescribed in Section 319 of the Revenue Act of 1924 were modified and reduced, and as so modified and reduced were made applicable to returns for federal gift taxes for the calendar years 1924 and 1925.

TENTH: That thereafter and on the 30th day of March, 1926, pursuant to the provisions of Section 325 of the Revenue Act of 1926, and without waiving, relinquishing or releasing her right to recover the whole amount of the tax paid with interest, claimant duly filed a claim for refund in the sum of thirty-seven thousand, eight hundred seventy-six dollars and twenty-seven cents ($37,876.27), which said sum represented the difference between the principal amount of the tax and interest assessed against and paid by her as aforesaid, and the principal amount of tax and interest assessable under said Section 324 of the Revenue Act of 1926; that said claim for refund was duly allowed in full by the Commissioner of Internal Revenue on the 19th day of November, 1926.

ELEVENTH: Claimant is advised and therefore avers that the imposition and collection of said tax and interest thereon from claimant was wrongful, erroneous, illegal, unconstitutional and void for the reasons, viz.:

1. That the tax imposed under Title III, Part II of the Revenue Act of 1924, is a direct tax and in violation of Article I, Section 2, Clause 3, and Section 9, Clause 4, of the Constitution of the United States, because not laid in proportion to the census and apportioned among several states, as provided by the Constitution.

2. That the collection of said tax was a taking of claimant's property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

3. That the gifts made by claimant were not within the purview of the said Title III, Part II, of the Revenue Act of 1924, and that if said gifts were within the purview of said Title, said Title may not legally be retroactively applied to impose a tax upon gifts made prior to June 2, 1924, because said tax would be unavoidable and therefore a direct tax in violation of Article I, Section 2, Clause 3, and Section 9, Clause 4, of the Constitution of the United States, and collection of said tax would be a taking of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

4. That the tax on gifts is void because it is unreasonable and of a capricious classification, in violation of the Fifth Amendment to the Constitution of the United States.

5. That the collection of the tax resulted in the taking of claimant's property for a public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States.

6. That if said tax is an indirect tax it is not uniform throughout the United States, and is void under Article I, Section 8, Clause 1 of the Constitution of the United States.

TWELFTH: Claimant avers that no action upon this claim, other than herein set forth, has been taken before the Congress or other of the Departments of the Government, or in any Court other than the petition filed in this Court; that claimant is the sole owner of the claim herein sued upon, and that no assignment or transfer of the said claim or any part thereof or any interest therein has been made; that claimant is justly entitled to the sum of seventy-

eight thousand, one hundred forty-nine dollars and three cents ($78,149.03) with interest from the United States of America, after allowing all just credits and off-sets; that claimant has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said government, and that she verily believes the facts stated in this petition to be true.

WHEREFORE, claimant prays for judgment in her favor and against the United States for the said sum of seventy-eight thousand, one hundred forty-nine dollars and three cents ($78,149.03), with interest.

HELEN S. SCHMIDT,
By HANS SCHMIDT, JR.,
Attorney-in-Fact.

KENEFICK, COOKE, MITCHELL & BASS,
Attorneys for Claimant,
Office and Postoffice Address:
1330 Marine Trust Building,
237 Main Street,
Buffalo, New York.

State of New York, }
County of Erie. } ss.:

HANS SCHMIDT, JR., being duly sworn, deposes and says that he resides in the City of Buffalo, New York, and is the attorney-in-fact for Helen S. Schmidt, the above named claimant, and that he is duly authorized to present this petition and make this verification; that he has read

the foregoing petition signed by him on behalf of said claimant, and that the same is true except as to those matters therein alleged upon information and belief, and as to those matters he believes it to be true.

HANS SCHMIDT, JR.

Subscribed and sworn to before me this 23d day of April, 1927.

THOMAS F. FANNING,

(SEAL) *Notary Public in and for Erie County, New York.*

FILED
OCT 3 1927
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

No. 154

JOHN W. BLODGETT,

Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,

Defendant-in-Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF AS AMICUS CURIAE.

HENRY G. GRAY, ESQ.,
GEORGE GRAY ZABRISKIE, ESQ.,
Of Counsel.

SYLLABUS.

PAGE

Notice for leave to file brief as *amicus curiae*..... 1

Petition for leave to file brief as *amicus curiae*..... 2

Introduction 3

Preliminary matters 4

POINTS OF ARGUMENT.

POINT I: A gift tax is a property tax and hence unconstitutional..... 5

(1) Analysis of a legal right..... 5

(2) The element of protection of the state in a tax 8

(3) Analysis of a gift..... 9

(4) A gift distinguished from other transactions which have been furnished the basis of an excise tax 16

(a) Sale 16

(b) By Will or Intestacy 16

(c) Miscellaneous excise taxes..... 17

(5) Summary of the nature of a gift compared with other taxes..... 19

POINT II: To uphold the gift tax would practically abolish the constitutional distinction between direct and indirect taxes..... 20

POINT III: The gift tax is so capricious as to violate the fifth amendment..... 22

POINT IV: The gift tax amounts to a deprivation of freedom of contract and liberty. It effects a confiscation of property..... 28

Authorities Cited.

PAGE

Allgeyer v. *Louisiana*, 165 U. S. 578 ..... 5 30

Child Labor Cases, 259 U. S. 20 21

Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 288 .. 14

Flint v. *Stone Tracy Co.*, 220 U. S. 151, 152 21
Frew v. *Barnes*, 12 Fed. (2nd) 624 9

Gardner v. *Hall*, 61 N. C. 21 8

Holy Trinity Church v. *U. S.*, 143 U. S. 457, 465, 468, 470 10
Hylton v. *U. S.*, 3 Dallas 171 ..... 18 20

Knowlton v. *Moore*, 178 U. S. 41, 55 17

Lewellyn v. *Frick*, 268 U. S. 238 23

N. Y. Trust v. *Eisner*, 256 U. S. 345 17
Nicoll v. *Ames*, 173 U. S. 509 16
Nicholls v. *Coolidge*, 47 Sup. Ct. Rep. 710 ..... 5 22

Pierce v. *U. S.*, 252 U. S. 200 18
Pollock v. *The Farmers' Loan & Trust Co.*, 157 U. S. 429 13

Thomas v. *U. S.*, 192 U. S. 363 ..... 16 21

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194 8

Treatises Cited.

Holland, Jurisprudence, 10th Edition 6 12
Holmes, The Common Law 6

Ihering, Geist des Romischen Rechts III, 4th Edition 7

Maine, Ancient Law 11

Salmond, Jurisprudence, 7th Edition 7
Stone, Law and Its Administration 7

Vinogradoff, Common Sense in Law 7

IN THE

Supreme Court of the United States.

No. 779.

JOHN W. BLODGETT,

Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,

Defendant-in-Error.

Notice for Leave to File a Brief as *Amicus Curiae*.

You will please take notice that the undersigned, acting as counsel for a litigant interested in the questions involved in the above entitled suit, likewise interested in a pending litigation in the Court of Claims of the United States, will move the Court at the opening of the Court on the 3rd day of October, 1927, or as soon thereafter as counsel can be heard, for leave to file a brief as *amicus curiae*, and for such other or further relief as may be proper.

New York, September 1, 1927.

HENRY G. GRAY, Esq.,
GEORGE GRAY ZABRISKIE, Esq.,
Of Counsel.

To

MARX NORRIS, Esq.,
Attorney for Taxpayer
Plaintiff-in-Error.

HON. WILLIAM D. MITCHELL,
Solicitor General.
Dept. of Justice, Washington, D. C.

HON. HERMAN J. GALLOWAY,
Assistant Attorney General.
Dept. of Justice, Washington, D. C.

Petition for Leave to File Brief as *Amicus Curiae*.

IN THE
SUPREME COURT OF THE UNITED STATES.
No. 779.

JOHN W. BLODGETT,
Plaintiff in Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,
Defendant in Error.

The undersigned respectfully petition this Honorable Court for leave to file a brief as *amicus curiae* in the above entitled suit.

Your petitioners apply as counsel for Josephine S. Gosslwin, who is the plaintiff in a cause now pending in the United States Court of Claims entitled: "Josephine S. Gosslwin, plaintiff against The United States of America, defendant", No. F 53.

The issues presented in said above mentioned suit include determination of the validity and constitutionality of the so-called Gift Tax, or Sections 319-324 of the Revenue Act of 1924.

Your petitioners' client has paid a tax in the amount of $149,865. She seeks to recover this sum, and your petitioners believe that this amount is substantially larger than any other Gift Tax now before any court or any litigation now pending.

Your petitioners' client would be affected by the decision of the questions involved in the above mentioned suit of Blodgett v. Holden.

Notice of this application having been served upon the counsel for the respective parties in the above entitled suit all of which is respectfully submitted for the consideration and action of the Court.

Washington, D. C., September 1, 1927.

HENRY G. GRAY,
GEORGE GRAY ZABRISKIE,
Of Counsel.

IN THE

Supreme Court of the United States.

No. 779.

JOHN W. BLODGETT,

Plaintiff-in-Error,

vs.

CHARLES HOLDEN, U. S. Collector of Internal Revenue for the Fourth Collection District of Michigan,

Defendant-in-Error.

Introduction.

This brief is submitted by counsel as *amicus curiae* for the taxpayer, Mrs. Josephine Goodwin, who in April, 1924, several weeks before the date of the signing of the Revenue Act of 1924 by the President on June 2, 1924, conveyed to her three sons approximately $1,500,000 of property, consisting largely of New York City residential property and State and Municipal bonds; in other words, property not subject to the Federal Income Tax. The sons unconditionally agreed to pay her a sum equal to 2% of the value of the securities at the date of transfer, for the rest of her natural life. She filed her return and paid a tax of about $150,000 under protest, on the ground that the tax deprived her of liberty and property without due process of law, and contrary to the Fifth Amendment. Her suit to recover this sum is now pending in the Court of Claims and is awaiting the result of the Court's decision herein.

Counsel herein have perused the briefs submitted on behalf of the taxpayers in the Circuit Court of Appeals and will not attempt to trace the ground so ably gone over therein. However, it is believed that some arguments of a different nature or presenting considerations from a different viewpoint, may not be amiss.

Preliminary Matters.

In order to narrow the issue as much as possible, the attention of the Court is respectfully invited to the following matters which it is believed will not be disputed:

1. The Gift Tax is not apportioned among the States and, therefore, to be constitutional it must not be a tax on property or an essential equivalent of property, but an indirect excise tax. Conversely if it is a tax on property, it must be apportioned.

2. An excise tax, to be valid, must be a tax upon the exercise of some legal right or privilege. The terms "right" and "privilege" have been held synonymous in many decisions involving excise taxes and, therefore, in this brief, the word "right" will be used. The Government's contention is that the making of a gift is a right, the exercise of which may be taxed by the Federal Government as an excise, without being apportioned.

3. The congressional power of taxation is subject to the clause of the Fifth Amendment which concerns the taking property without compensation, or depriving one of liberty, without due process of law. There are some dicta in some decisions to the contrary, but it is now clear that

the taxing power is limited by the amendment at least if the tax is arbitrary or capricious, *Nicholls v. Coolidge*, 47 Sup. Ct. Rep. 710, decided May 31st, 1927.

4. The tendency of this Court in recent years has been in favor of disregarding the form and looking only at the substance of a tax measure. Perhaps the most striking illustration of this tendency is to be found in the *Child Labor* cases.

POINT I.

A Gift Tax is a Property Tax and hence unconstitutional.

1. *Analysis of a Legal Right.*

Many legal rights which citizens or persons possess were not created or given by the Government. This Court, usually when construing the word "liberty" in the Fifth and Fourteenth Amendments, has in effect adopted as the law of the land, the statement in the Declaration of Independence to the effect that governments are instituted to *secure* certain inalienable rights, not to create them, *Allgeyer v. Louisiana*, 165 U. S. 578. It is, therefore, apposite to consider whether or not the so-called right to make a gift is a right given or protected by the law and hence taxable as an excise.

A legal right is contrasted with a moral right, and the distinction lies, of course, in the enforcement of the right. A legal right is enforced by the State, usually through the Courts, whereas a moral right is one enforced, not by the State, but by an indeterminate body, *e. g.*, by public opinion be levied only upon the exercise of a legal right. It may well be, of course, and undoubtedly frequently is true, that for such proposes a legal right and a moral right are the same.

It is perhaps difficult to find a more satisfactory definition of a legal right than that given by *Holland* (Jurisprudence, 10th Ed. Ch. 7, p. 79):

> "A capacity, residing in one man of controlling, *with the assent and assistance of the State* the actions of others."

Holland then proceeds to analyze a legal right dividing it into the following component parts (ch. 8):

> 1. The owner of the right, whom he called "The person of inherence".
>
> 2. The object over which the right is exercised, *e. g.*, a piece of land.
>
> 3. The acts or forbearances which the person of inherence is entitled to exact.
>
> 4. The person or persons against whom the right is asserted, whom he calls "The person of incidence".

Other well known definitions of legal rights are the following:

> *Holmes, "The Common Law"*, page 214. "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force * * *. Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives anyone special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the world, are true of him * * *"

Ihering. "Rights are legal protected interests," Geist des Romischen Rechts III, page 339, Fourth Edition.

Stone, "Law and its Administration," page 51. "In substance, a man's legal right is his sphere of freedom of action with respect to others and things as it is fixed and defined by law. We say that law protects a man's rights, meaning thereby that his use and enjoyment of things and the freedom of his person and his character or reputation are protected from anti social interference and injury by the rules of law which visit certain penalties on those who are guilty of such interference."

Ibid, page 52. "Thus, when we speak of one's right, we mean his right successfully to apply to the Courts and set them in motion, because some one has done him a wrong, either for the purpose of restraining a violation of law, or recovering damages for its violation; or in the case where the right is to possess property, to have the property turned over to the person entitled to possess it. Thus, all rights, in their last analysis, are rights to apply to some court for its relief, and generally speaking, rights exist only where there is some remedy for their invasion, afforded by some court. If there is no remedy there is no right."

Every right implies a duty, *Vinogradoff*, "Common Sense in Law" (Ch. 3).

Salmond, "Jurisprudence," Seventh Edition, page 240. "Rights and duties are necessarily correlative. There can be no right without a corresponding duty, or duty without a corresponding right, any more than there can be a husband without a wife or a father without a child."

2. *The Element of Protection of the State in a Tax.*

In every tax there should be, from a sociological and economic standpoint, and, according to many decisions (some of them of this Court), from a legal standpoint as well, an element of protection from the State, in return for which, in whole or in part, the tax is levied. On this theory alone can be justified the levying of an income tax on American citizens residing abroad, who derive all their income from foreign sources, *e. g.*, an American engaged in business in England. As he is an American citizen, the State Department will protect him should he need it. It is unnecessary to discuss the question as to whether taxation and protection are entirely correlative, although in *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, this Court said that such was the case. In *Gardner v. Hall*, 61 N. C. 21, a decision of peculiar interest because it treats of a capitation tax, which the constitution calls a direct tax, the Court said:

> "A capitation tax is one upon a person simply, without any reference to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow. It is rightfully imposed, *because of the protection which the Government affords* to the person, independently of the connection or relation of the person to anything else."

The Gift Tax, on the other hand, is imposed only if, as, and when the taxpayer ceases to need protection. The Government may contend that the Gift Tax is levied, not upon a right, but upon a privilege. Some jurists, such as Hohfeld, attempt to draw a subtle distinction between a right and a privilege. Others disregard the distinction entirely. The word "privilege"

cannot be found even in the indices of such works on jurisprudence as Holland, Holmes, Pollock, Salmond, Stone and Vinogradoff. Dean Pound of Harvard Law School has said of Hohfeld's analysis that it is quite without jural significance. Finally, the courts, in construing excise taxes, have distinctly stated that it is immaterial whether the occasion of the levying of an excise is the exercise by the taxpayer of a right or a privilege. *Frew* v. *Barnes*, 12 Fed. (2nd) 624.

3. *Analysis of a Gift.*

Property consists of certain elements. These are known by various other terms such as rights of property, attributes or incidents of property. To speak of attributes or incidents of property is often misleading. It tends to further the concept that property is the tangible physical object. In many opinions "property" is used in this latter sense. The loose use of the term "property" is responsible for many of the apparently conflicting decisions in respect of taxation. The term "property" is used more correctly to signify rights in or to an object. Originally there was no property except in a physical sense, nor any law. But these institutions have developed and in the development property became endowed with certain fundamental elements apart from law. These elements are possession, use, and gift. After discovery of the physical object the first elements of property must have been possession and use. Practically coincident with these came that of gift.

The gift of property, or the exercise of property by way of gift or the gift value of property attached itself as a fundamental element of property not by any statute or decree nor by any man-created law but originated and became firmly established as a social and moral expres-

sion of the race before law came into being. The transfer of property by gift is as fundamental as the so-called right or exercise of self defense. Courts have been unanimous in holding that the right of self defense is not a right founded upon law but rather upon natural instincts which when law came into existence was acknowledged by it and secured by it.

The Revenue Act of 1924 places a tax upon gifts. In order to decide whether such a tax is valid, it must first be determined concerning the nature of gifts.

In the lives of primitive peoples their deities were the objects most revered and likewise feared. Consequently their graven images received from them worship and adulation in the highest form conceivable by them. The tangible form in which this worship was shown was by gifts, varying from fruits of the field to their own children. Discoveries and conquests were undertaken and property of their enemies reduced to possession solely to offer it to their gods or as gifts to friendly potentates.

History records amongst all races costly gifts were presented as tokens of esteem, affection, appreciation and to solicit favor or gain rewards.

Under the Christian doctrines, the importance of the gift value of property has been manifoldly increased. It can be safely asserted that giving of one's property to others is one of the chief tenets of the Christian church. The principle that "He that hath shall give" has been part of the Christian nations' philosophy long before Common or Statute Law, as we know it, came into effect. Christianity is part of the Common Law, *Holy Trinity Church* v. *United States*, 143 U. S., 457, 465, 468, 470.

The unit of our social structure, the family, has been

wholly dependent upon gifts. The *paterfamilias* worked and acquired, not for himself alone, but to enable him to give to others of his family, either incapable of work or less fortunate than himself. In the majority of cases his desire to obtain acquisition of physical property is for the direct purpose of giving it away.

The elements of what we call property have never been fixed by legislative fiat. They have developed as the race advanced. Judicially they have been formed by the importance attached to each element. Such elements are derived from the moral and social viewpoint of the community. In early stages he who acquired possession did so by his individual strength. He defended his use of the property and his disposition of it in the same manner if questioned. A state of society based upon the doctrine of private property must recognize the historical development of private property. In this development the gift element of property has been as outstanding a characteristic even more than the use and possession.

Various attempts have been made to define property. The concept is best secured by reviewing its development historically. Blackstone says, "The origin of private property is probably founded in nature," and by nature he probably means nothing other than gradually evolved from earliest times. Many of the elements of property are not created by law. Maine (Ancient Law, Ch. 8, Early History of Property) follows Savigny in stating that ownership grew out of possession, ripened by prescription. By way of summary, physical property acquired its value by reason of attaching to the physical object certain fundamental qualities. It is contended that these natural qualities are property.

The argument used now to sustain the Gift Tax

attempts to distinguish between property and the transfer of the property, claiming that the property is something separate and apart. Secondly, the Government claims that even though the right to make a gift be a natural right, an excise may be levied upon the exercise of that right.

The first contention ignores the accepted definition of property, purporting to assign to it a restricted physical meaning.

The second contention attempts to make a distinction where none exists. A right only comes into being by its exercise. Metaphysically considered only, may it exist apart from its exercise. (Holland, "Jurisprudence," Ch. 10, "Rights at Rest and Rights in Motion".) The right of gift is property. The gift is accomplished only by the exercise of the right. If there is no exercise of the right there is no gift. If the exercise of the right is prohibited, the gift and thus a part of the property is destroyed. If the exercise is taxed, the gift and thus the property is taxed.

It is absurd to say that use of property (which is one of its elements) is different from the exercise of that use, the use itself being the exercise of property rights to which the owner is entitled.

Were the contention of the Government sound, it would destroy all prevailing concepts of property. Property rights are to be limited by the Government's definition to mere passive rights of possession, use and disposition. When the property owner seeks to enjoy his property in any form (which by definition is what constitutes property) they would say he merely exercises a right which is something apart from his property and thereby

taxable. They thus set up in effect a new concept of property and abolish the term as known at Common Law.

Concretely it would amount to this. A man has valuable silverware which, being his property, we say he has a right to use. A tax on this property would be a direct property tax, but if he places it on his table, thus exercising his right to use it, the tax ceases to be a property tax. Query, must he lock it in a safe and refrain from exercising any of his rights? If so, what becomes of the value of the silver? To him it no longer has value. Since it is the exercise of the right to use which gives it property value, surely a tax on the exercise is a tax on property.

There is no need at present for theoretical argument. This Court has held that a tax on the income of property is a tax on the property itself. *Pollock* v. *The Farmers' Loan and Trust Co.*, 157 U. S. 429. The income is, however, merely the exercise of a right to use the property in a certain way, *i. e.*, to produce income. The property could just as well lie idle. The present issue was squarely met in the *Pollock* case. It was there decided that a tax on the exercise of property was a tax on the property itself and thus a direct tax.

The Court further said that it was "not decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by close analysis that they could not be shifted from the person on whom they first fall". By this statement the Court merely declared that inability to shift the tax was not an absolute test for a direct tax.

Actually, by this declaration the Court strengthened its previous pronouncement by saying that property in its exercise was nevertheless property and an excise of the type of an income tax was a direct tax. An income tax being a tax on the exercise of the right to use, a Gift Tax on the right to give here falls directly into this classification.

The other case involving fundamental elements of property is the *Dawson* case, 255 U. S. 288.

This is the more weighty because the facts were practically analogous to the instant case. A tax was there attempted to be levied on the act of the owner in taking his property out of storage into his own possession.

The Supreme Court then stated the principle which it is submitted controls this case. They said "*The whole value of the whiskey depends upon the owner's right to get it* from the place where the law has compelled him to put it *and to tax the right is to tax the value*".

Let us analyze this:

1. The act of removing the property is the thing taxed, i. e., the exercise of the right to remove.

2. Clearly the right to remove is not taxed because the owner has at all times the *right* to remove. However, this is not taxable so long as the owner does nothing and is willing to content himself with his bare unproductive and quite valueless right.

3. The value (property) to him consists in

his ability to exercise his rights in connection with the whiskey.

4. The Court held that a tax on value was a property tax and, therefore, direct and must be apportioned.

This is a clear enunciation that the exercise is the value and this value the property.

An argument which divides property into active and passive rights, and then by fiat calls the passive rights the fundamental property rights which must not be taxed except indirectly, and the active rights the exercise of these fundamental rights, violates age-long legal concepts.

By way of example: A farmer has a field; he walks on it, he plows it and raises corn from it. The Government would say that each of these acts is the exercise of a right which he has to do these things. Yet apart from these things his land is but a collection of certain chemicals of no value to anyone. It becomes valuable and is his valuable property only by its exercise. The exercise is his property. By way of illustration, as a common field it may have a value of $10, where his cattle may graze together with his neighbor's. As a field around which he has a right to build a fence it has a value of $50, for his cattle alone benefit thereby. As a field which he may plant and sow it has a value of $150. Each of these rights in its exercise is a definite property, making a total property of $150. Taxation of any one fundamental element is a property tax.

4. *A Gift Distinguished from Other Transactions which have Furnished the Basis of an Excise Tax.*

A. *Sale.*

Congress has at times levied taxes, usually in the form of stamps, upon transfers of stock certificates (*Thomas* v. *U. S.*, 192 U. S. 363), transfers by deed of real estate, and sales on the floor of a produce exchange (*Nicoll* v. *Ames*, 173 U. S. 509).

In the case of the sale of stock certificates, the Court upheld the tax on the theory that the vendor stockholder was availing himself of the right or privilege of disposing of a pro rata beneficial interest in the property of the corporation in question by the convenient form of handing over pieces of paper. In the case of deeds to real estate, the parties are not only given the advantages of the recording acts, but also are given a convenient way of transferring realty, instead of, for example, by the elaborate method of livery of seisin. In the case of sales on the produce exchange, the tax was on the privilege of using there offered, as opposed to a tax on every sale, which would be a property tax (*Nicoll* v. *Ames*).

B. *By Will or Intestacy.*

The Act levying a tax upon transfers upon death makes no distinction between transfer by will or by intestacy. This shows convincingly that there was no thought that the tax was upon the exercise of a right by the decedent to transfer his property by his own act, even assuming a decedent could accomplish such a result.

It is submitted that a man upon death, being no longer able to control or enjoy any of the elements of his property, he abandons it. Any legal effects given to his will or descent by laws of intestacy are created by the state.

> "The right to take property by devise or descent is a creature of the law and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it" (*Knowlton* v. *Moore*, 178 U. S. 41, 55).

This Court has upheld the estate tax, not because on the death of the intestate someone acquires rights to succeed to the property, but because the state or the Federal Government has the historic right to govern or impose conditions in the shape of taxes, upon the devolution of property upon the death of the last owner.

The estate tax is distinctly *sui generis*, and can hardly be used as an analogy for any other tax whatsoever. Again, there are historic grounds for this tax, existing since the days of the Romans, who gave us our system of inheritance and wills. Historically, the estate tax has always been considered an excise tax, and to quote Mr. Justice Holmes, "Upon this point, a page of history is worth a volume of logic" (N. Y. *Trust* v. *Eisner*, 256 U. S. 345).

C. *Miscellaneous Excise Taxes.*

From time to time, various federal excise taxes have been upheld, such as occupational taxes, *e. g.*, the right to pursue the vocation of liquor dealer, broker; the right

to use foreign-built yachts; the right to refine sugar; the right to manufacture tobacco products, automobiles, etc.

For most of these there is an historical basis. An excise tax is a tax on the manufacture or use of consumable goods, or the pursuit of a certain calling, according to the ordinary meaning of the term. It is admitted that the term has been extended, by judicial construction, beyond that sense. But in all these cases there is, in addition to the historical basis, the element of protection or invoking the aid of the state. The owner of a foreign-built yacht may have occasion to invoke the aid of the State Department in case of complications with a foreign government, or of the Court of Admiralty, in case of a collision, *e. g.*, in America. The broker may have to sue for commissions. The sugar refiner may need all sorts of protection, from the police, fire departments, the courts, etc. This should be paid for. The owner of a carriage (*Hylton* v. *U. S.*, 3 Dallas 171; or the modern equivalent, the motor car, has to use the public roads which the state must maintain. It may well be doubted whether the state could tax an unused carriage any more than it could tax an unused foreign-built yacht (*Pierce* v. *United States*, 232 U. S. 290).

An analysis of these cases should furnish a definition of an excise tax. At least from the several acts there taxed and the facts surrounding them, there will appear the nature of an excise tax in the mind of the courts. In these cases the exercise of a legal right and privilege has been interpreted to mean the taking advantage of rights and privileges conferred by the state.

5. *Summary of the Nature of a Gift Compared with Other Taxes.*

The donor is taxed for completing a transaction which gives him no economic benefit, which never can result in his needing or invoking the protection of the state or the Federal Government, which results in conferring upon the donee a right *in rem*, good against all the world, including the donor, and which has no historical basis. The legal nature of a gift or the so-called "right to make a gift" is so totally different from that of any other juristic acts or "rights" which may properly form the basis for an excise tax that no argument from analogy may properly be drawn.

The making of a gift is not accomplished by availing oneself of any right or privilege conferred by law. Nor is it any right arising out of business or commercial matters and thus a subject of regulation by the state. Rather it arises out of social right and cannot properly be made the subject of an excise. Compare the act of doing business in a certain manner or using certain restricted commodities or taking advantage of certain benefits conferred by statute, with a gift to a friend, of a cigar, a dinner, or shelter, or presents to one's family at Christmas time and, the distinction is obvious.

POINT II.

To uphold the gift tax would practically abolish the Constitutional distinction between direct and indirect taxes.

The distinction between direct and indirect taxes, so clearly laid down in the Constitution, must be preserved. The political situation in existence at the time of the drawing up of the Constitution required the insertion of this clause about apportionment, without which the southern states would have been at the mercy of the other states (*Hylton v. United States*, 3 Dallas 171), and hence would not have consented to the adoption of the Constitution. It may well be with the advance of civilization, with its resulting complexities, and with the necessity of raising new taxes for increased governmental expenditures, that, from an economic or political standpoint, this distinction should be wiped out. But unless and until a constitutional amendment abolishes the distinction, it should not be strangled in a network of judicial niceties by calling any kind of a tax a tax on an alleged "right", and hence a valid excise tax.

The founders of the Constitution, whether wisely or not, drew a very careful distinction between direct and indirect taxes. Much confusion has resulted from the decisions of the courts in marking out a clear distinction between the two. Various tests which have at one time been deemed decisive have subsequently been altered, *e. g.*, whether the incidence of the tax may be shifted from the taxpayer to someone else, whether a direct

tax was limited to capitation and real estate taxes, etc. The present test appears to be whether there is an absolute and unavoidable demand (*Thomas* v. *U. S.*, 192 U. S. 363; *Flint* v. *Stone Tracy Co.*, 220 U. S. 151, 152).

At the present time there is a commendable tendency to pierce the disguise of any tax and call it by its own name, regardless of the garb it may temporarily wear. With all due respect to the courts, it is contended that the net result of the various decisions in cases where the taxpayers have contended that various taxes were direct taxes has been to whittle away the constitutional, if vague, distinction of direct and indirect taxes. It is submitted that to justify the gift tax as an indirect excise tax would be to abolish the distinction altogether for the following reasons:

The fundamental elements of property are commonly given as possession, use and disposition.

If a tax on the exercise of the right of disposition is considered indirect and thus constitutional, a tax on the exercise of the rights of possession and use must be equally valid. However, there are no other rights of property, the property being the sum total of these rights.

The situation is analogous to that familiar case where there are, say, four remedies for a certain legal situation, *e. g.*, the recovery of real property, and the Legislature abolishes one of them, and claims that as there are three left, there is no deprivation of property without due process. But this argument is valid only three times. When the fourth rolls around, the Court should call a halt. Congress cannot do indirectly that which it is forbidden to do directly, *Child Labor Cases*, 259 U. S. 20.

A final analogy may be useful. Assume that Congress passes an act, taxing the marriage of a person, and measuring the tax by the amount of his wealth. The Government would doubtless contend that this is a proper tax, and is an indirect tax on the act, occasion or the exercise of a legal right or privilege, viz., contracting matrimony.

Assume, further, that Congress, stimulated by the example of Signor Mussolini, passes a tax on bachelors over, say, 30 years of age—and that while the former tax on marriages is in effect, and measures the tax by the bachelor's wealth. Surely it is the right (or privilege) of an American citizen *not* to get married.

The net result of these two hypothetical measures would be a direct poll tax, or a direct federal property tax, under the guise of indirect excise taxes on the right or privilege of marrying or not marrying.

POINT III.

The gift tax is so capricious as to violate the Fifth Amendment.

Although there may be found many dicta to the effect that the Fifth Amendment is not a check upon the taxable power of Congress, nevertheless, several recent decisions of the Court lay down the rule clearly that if the tax is capricious and arbitrary, it is unconstitutional in that it deprives persons of property without due process of the law (*Nicholls* v. *Coolidge* (*supra*)). This is especially true in view of the retroactive features of the law.

A. First of all it must be observed that the tax is posed upon all residents of the United States, and on all non-residents as to gifts of property located thin the United States. Citizenship is immaterial.

It will be noted that to this extent the gift tax follows e estate tax.

In the estate tax regulations, the Government states, though there is nothing in the law to that effect, that reign real estate is not subject to the estate tax, even though the decedent may be both a citizen and a resi- nt of the United States. *There is no such similar pro- sion in the gift tax regulations.* Therefore, a British bject who was a resident of the United States for a ar or so, who in January, 1924, made a gift of land cated in England, would, according to the Government, compelled to pay a tax upon the so-called "right" hich he exercised some months before the passage of e Act. The same is true of other foreign immovables, g., leaseholds. Yet over this property the United tates has no jurisdiction (*Lewellyn* v. *Frick*, 268 U. S. 38).

B. The statute discriminates amongst the general lass of donors by taxing those who give money or things hich may be converted into money.

Two donors wish to bestow kindness upon a friend r relative of each who, being alone in the world, has o means of support. The one gives a sum of $150,000, pon the income of which the donee could live. The ther takes his friend or relative into his home, provides or his wants and gives him all the wealth which comes

from a happy and contented home life. There is no question which is the greater gift. Yet the donor who gave the money is taxed. The donor who made the greater gift is not.

C. There could be enumerated countless instances of gifts which have a value far greater than a money gift. The gift whereby a man, experienced or wise in fields of learning or business, gives his time, his interest and his inspirational quality, have often been the means of enabling a man to realize upon this gift in a valuable monetary way.

A lawyer whose time may be valued at thousands of dollars a day may spend many hours or days on a case for a friend and send no bill.

Likewise a doctor may perform the same operation for which he charges some patients $50,000, for nothing for persons who, although not charity patients, are in very reduced circumstances. Who can say the fair market value of the operation which saves a man's life? Yet the doctor, the donor, would be taxed for such operations, even though it were an emergency one, necessary to save life, and no other surgeons available, if he sent a bill and then cancelled it, out of friendship or some other reason.

If a man's marriage inspires a distinguished literary friend to write a poem or a play, to be read at the happy occasion, must the author be subjected to a gift tax if the market value of his literary efforts is over $500 per poem or per play? Would Longfellow have been subjected to a gift tax for writing "Morituri Salutamus" for his class reunion?

If a distinguished portrait painter, who gets over $500 per portrait, paints his children for the purpose of making a gift of the work to his wife for a birthday present, must he pay a tax?

If a prospective husband makes a marriage settlement on his fiancee, he must pay a gift tax. Should he not also be compelled to pay a gift tax merely by marrying her, even without a settlement, if he owns a lot of real property, and she immediately acquires valuable rights of inchoate dower or community property?

The gift law does not apply to the large majority of donors as a class but arbitrarily discriminates in a most capricious manner by placing the burden of a tax on those who give money or objects easily reducable to money.

D. If some ardent and sincere prohibitionist, such as Mr. Wayne B. Wheeler, the counsel for the Anti-Saloon League, should be made legatee under the will of some eccentric non-prohibitionist of some shares of stock in Bass' or Guiness' Company of Great Britain, and naturally refused to accept the gift, he would have to pay a tax for this expression of his social and political views, as it would be a gift to the residuary legatee or the next of kin. If Mr. Garland, the well-known Massachusetts communist, had renounced his inheritance of several hundred thousand dollars because it would be contrary to his view on sociology and political economy to take it, thus giving it to others, this would require, according to the Government, the payment of a tax on his part. If a Quaker should inherit a munitions factory, and under the intestate law become vested with title immediately on the death of his relative, his refusal to accept

it is a gift to the next heir, and he is taxed for his religious views. If Mr. Rockefeller had loaned a friend of his some money some years ago and decided some time in the early part of 1924 that he did not need the money as much as his friend did and executed a release in his friend's favor, he would have to pay a tax even though the debt consisted of a mortgage on foreign real estate. If a debtor whose debt is barred by the Statute of Limitations, makes a new promise in writing to pay the debt, he would presumably have to pay a tax for the exercise of the so-called "right" of waiving the right to set up his defense of prescription. If Sir Walter Scott, Mark Twain and General Grant (assuming that they had been alive in the year 1924) had waived the bar of a discharge in bankruptcy and proceeded to pay off their barred debts by their literary efforts, such actions would have been taxable, according to the Government, because they were exercising a "right" to pursue a course of conduct to which their moral duty urged them.

If a man of modest means, in a momentary burst of grateful enthusiasm, accepts from a wealthy benefactor (or one whom he at first regards as a benefactor) a steam yacht or a white elephant (to use a classic illustration), and the first shortly proves to be the second, and there is no market for such a commodity, he could not unload the gift on some friend of his without paying for the "right" not to keep a yacht or a proboscidean.

Some years ago, a wealthy American Anglophobiac provided in his will that if his child ever visited England, she should lose her share of the estate, which should pass to the residuary legatee. Suppose out of affection for the residuary legatee, or a desire to see the world, the child goes to Europe. Is this a gift to the residuary

legatee, and if so, is it a tax on the right to go to Europe, like a passport tax?

Finally—a wealthy, middle-aged man, in good health, with a life expectancy of many years, desires to settle on his daughter, on the occasion of her marriage, enough money to yield her $10,000 a year. Assume he takes a demand note from her and negligently or carelessly, or in a spirit of indifference, lets the Statute of Limitations run. Does this constitute a gift, and if so, in what year is the gift made? Is he justified is assuming that if he sues her, she will set up the Statute of Limitations, and hence suit is futile? Suppose the daughter, after the marriage, acquires a domicil in a state or a foreign country with a shorter statute of limitations than in the domicil of the father, and that the latter, in good faith, through ignorance of the foreign law, does nothing until the foreign prescriptive period has elapsed, although his own statute has not run. Is this a gift, and if so, when?

In view of the above, it is perhaps not too fanciful or presumptuous to state that the founders of our Constitution would be mildly startled at this version of an "excise". Possibly the gift tax is that extraordinary tax referred to by Justice White in the *Pollock* case (157 U. S. 557), which "for more than 100 years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue".

POINT IV.

The gift tax amounts to a deprivation of freedom of contract and liberty. It effects a confiscation of property.

A tax cannot exist theoretically. It must be judged in practical application, and this with proper regard for the contingencies which may arise.

The gift tax in effect amounts to a confiscation of property. Let us assume that a clergyman is the possessor of a Gutenberg Bible worth, we shall say, $150,000. About to depart for China he is desirous of giving it to his best friend, another clergyman, in order that it may be in safe and sympathetic hands. With no ready cash and no ability on the part of the donee to pay the tax, he cannot give it away. The gift tax law for all practical purposes changes his absolute ownership to a life estate in the property. It does not need acturial figures to illustrate that a life estate is of much less value than the fee. This reduction is a confiscation of property without any compensation whatsoever.

To show more vividly the injustice of the retroactive feature of the Act, assume that the gift was made in January, 1924, and that in May, 1924, the Bible was destroyed by fire, so that the lien of the Government for the tax could not attach. The donor might have his life's savings swept away.

The law furthermore destroys freedom of contract.

Section 323 places a tax on all sales or exchanges for less than fair consideration in money or money's worth.

This section deprives the individual of the privilege of contracting as he sees fit, and places the Government as the party who must decide how much each bargain is worth to the parties. At common law it is well established that the courts cannot make a new contract for parties.

The consideration existing in most bargains depends entirely on the conditions surrounding the particular bargain and the private affairs and state of mind of the parties concerned. These things fix the consideration. Love, affection, moral obligation, religious convictions, and social background all contribute. These are the qualities which the Government says must be reduced to money's worth, and, by the Government.

To make an evaluation on these things requires a certain standardization. And yet these very things cannot be standardized.

Strangers to a transaction can never know or appreciate the considerations which prompt the parties to reach their particular bargain.

For example, in a restricted residential community consisting of large estates where all the residents are friendly and of the same social class, a certain member has to dispose of his estate. He receives an offer of $350,000 from a friend of his own circle known to his friends and liked by them. Two other offers are made of $500,000 by men whose only qualification is money, who in other respects are totally unfitted to reside there and who would, if allowed to buy, injure the community. Considering these things, a sale is made for $350,000. Yet undoubtedly the market value of the property, as evidenced by the offers from the undesirable purchasers, would be $500,000. Yet to the seller, under the circum-

stances, the consideration to the mind of the seller was adequate. Any tax or penalty exacted would grossly violate the seller's freedom of contract.

Most of the statements made in the last point, about the capricious and arbitrary nature of the tax, apply here as well. The term "liberty" in the Fifth Amendment means much more than freedom from physical restraint—it means the right to own and hold property, to make contracts in respect thereto, etc. (*Allgeyer* v. *Louisiana*, *supra*). The restraints imposed by the gift tax in the cases heretofore mentioned are at least as vital and fundamental as the right to learn German, to be an employment agent, to work over ten hours a day in a bakeshop, or to hire Germans or Austrians.

> "In every society there is a point beyond which regulation of conduct ceases to be of social service and becomes burdensome and oppressive to the individual. This necessarily limits the field of law and leaves the control of many human relationships to the individual sense of what is right or desirable conduct" (Stone, Law and its Administration, p. 9).

The decisions of the lower Court should be reversed, and the law declared unconstitutional, both in its retrospective and its prospective features.

HENRY G. GRAY,
Amicus Curiae.

New York City.

FILED
SEP 28 1927

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 154.

JOHN W. BLODGETT

against

CHARLES HOLDEN, as Collector of Internal Revenue for the Fourth Collection District of Michigan.

BRIEF FOR FANNIE E. UNTERMYER AND EDWARD D. UNTERMYER, AS EXECUTORS, AMICI CURIAE.

LOUIS MARSHALL,
Of Counsel.

The Rieder Press, 37 Warren St., N. Y. Tel. Worth 2-3-3.

INDEX.

PAGE

STATEMENT 1

POINT I—Section 319 of the Revenue Act of 1924 violates the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the gift sought to be taxed of his property without due process of law 2

POINT II—The tax imposed by the Revenue Act of 1924 on gifts *inter vivos* is a direct tax and void because not apportioned as required by Article I, §2, clause 3, of the Constitution 14

POINT III—A gift made during the calendar year 1924 and prior to June 2, 1924, the date when the Revenue Act of 1924 became a law, was not made taxable by that Act; but if intended that it should be, the Act, in so far as it related to a gift so made, was void because in violation of the Fifth Amendment to the Constitution of the United States 15

PAGE

Schlesinger v. Wisconsin (270 U. S. 230) 10
Sherman v. Elder (24 N. Y. 381) 4
Shwab v. Doyle (258 U. S. 529) 15
Smietanka v. First Tr. & Sav. Bank (257 U. S. 602) . 17
Smith v. Campbell (10 N. C. 595) 5, 7

Thomas v. United States (192 U. S. 363) 12

Union Trust Co. v. Wardell (258 U. S. 537) 17
United States v. Field (255 U. S. 257) 17

Williams v. Guile (117 N. Y. 348) 7
Wynehamer v. People (13 N. Y. 396) 3

TEXT BOOKS.

Bouvier's Law Dictionary, Baldwin's Century Edition (1926), p. 995 2
Story, Eq. Jur., Sec. 606 7

Supreme Court of the United States

OCTOBER TERM, 1927.

JOHN W. BLODGETT against CHARLES HOLDEN, as Collector of Internal Revenue for the Fourth Collection District of Michigan.	No. 154.

BRIEF FOR FANNIE E. UNTERMYER AND EDWARD D. UNTERMYER AS EXECUTORS, AMICI CURIAE.

Leave has been granted to the executors of the late Isaac Untermyer to file a brief herein as *amici curiae*. They are the petitioners in proceedings brought here by writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit. Under the title *Untermyer v. Anderson*, that cause is No. 221 on the present docket of this Court. The questions of law involved in that litigation are substantially the same as those certified in the cause specified in the caption of this brief. They relate to the constitutionality of the so-called gift tax sought to be imposed by Sections 319 to 324 of the Revenue Act of 1924, and the applicability of that Act to gifts made prior to the date when it went into effect.

When President Coolidge signed the Revenue Law of 1924, he took pains to make the precautionary statement:

> "A gift tax is a further invasion of the rights of the citizen, both unusual in nature *and of doubtful legality.*"

I.

Section 319 of the Revenue Act of 1924 violates the Fifth Amendment to the Constitution of the United States, in that it deprived the donor of the gift sought to be taxed of his property without due process of law.

At the time when the gift was made, the donor had the absolute right to deal with the subject matter of the gift, whether it consisted of realty, personalty, money, or things in action, as he saw fit. It was his property, and one of its incidents, which was in itself a property right, was the power to sell it or to give it away. A law which undertook to prohibit such a right of disposition was in effect confiscatory in its operation. If the law did not go so far as absolutely to prohibit such disposition, but imposed upon the exercise of the power a tax, it would have been *pro tanto* an invasion of the owner's property right, and, as we shall argue under Point III, especially if the taxing law were retroactive in its scope and enacted subsequent to a transfer made of the property.

It is scarcely necessary to cite many authorities in support of this fundamental principle. The doctrine is compactly stated in Baldwin's Century Edition of *Bouvier's Law Dictionary* (1926) under the title "Property," page 995:

> "When things are fully our own, or when all others are excluded from meddling with them or

> from interfering about them, it is plain that no person besides the proprietor, who has this exclusive right, can have any claim either to use them, or to hinder him from disposing of them as he pleases; so that property, considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them, either by exchanging them for other things, or by giving them away to any other person without any consideration, or even throwing them away. Rutherforth, Inst. 20; Domat, liv. prel. tit. 3; Pothier, *des choses;* 18 Viner, Abr. 63; Com. Dig. *Biens.* See, also, 2 B. & C. 281; 9 id. 396; 3 Dowl. & R. 394; 1 C. & M. 39; 4 Call 472; 18 Ves. 193; 6 Bingh. 630."

In *Wynehamer* v. *People*, 13 N. Y. 396, 397, Judge Comstock gives expression to this idea in terms that have become classic:

> "Now, I can form no notion of property which does not include the essential characteristics and attributes with which it is clothed by the laws of society. In a state of nature property did not exist at all. 'Every man might then take to his use what he pleased, and retain it if he had sufficient power; but when men entered into society and industry, arts and sciences were introduced, property was gained by various means, for the securing whereof proper laws were ordained.' (Tomlin's Law Dic., Property; 2 Bl. Com. 34.) Material objects, therefore, are property in the true sense, because they are impressed by the laws and usages of society with certain qualities, among which are, fundamentally, the right of the occupant or owner to use and enjoy them exclusively, and his absolute power to sell and dispose of them; and as property consists in the artificial impression of these qualities upon material things, so, whatever removes the impression destroys the notion of property, although the things themselves may remain physically untouched.

> Nor can I find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Com. 138): 'The third absolute right of every Englishman is, that of property, which consists in the free use, enjoyment and *disposal* of all his acquisitions, without any control or diminution, save only by the laws of the land.' Chancellor Kent says (2 Kent's Com. 320): 'The exclusive right of using and *transferring* property follows as a natural consequence from the perception and admission of the right itself.' And again (p. 326): 'The power of *alienation of property* is a necessary incident to the right, and was dictated by mutual convenience and mutual wants.' • • • These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale and placed without the protection of law, it were well that the attempt should be made."

In *Sherman* v. *Elder*, 24 N. Y. 381, 384, Judge Allen said:

> "Property considered as an exclusive right to things contains not only a right to use them but a right to dispose of them either by exchanging them for other things or by giving them away to any other person without any consideration, or even throwing them away."

In *People* v. *Otis*, 90 N. Y. 52, Chief Judge Andrews said:

> "Depriving an owner of property of one of its essential attributes, is depriving him of his property within the constitutional provision."

In *Chicago & Western Indiana R. R. Co.* v. *Englewood Connecting Ry. Co.* (1886), 115 Ill. Rep. 375, 385, the Court said:

> "• • • for property itself, in a legal sense, is nothing more than the exclusive right 'of possess

ing, enjoying and disposing of a thing,' which, of course, includes the use of a thing."

In *Jaynes* v. *Omaha Street R. Co.* (1898), 53 Neb. 631, 653:

"* * * 'Property' in its appropriate sense means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or objects, and generally to the exclusion of all others, and doubtless this is substantially the sense in which the word is used in the constitution, as to the taking or damaging of private property for the public use."

In *Smith* v. *Campbell* (1825), 10 N. C. 595, 597:

"Property is a thing over which a man may have dominion and power to do with it as he pleases, so that he violates not the law. He may give, grant, or sell it at his pleasure."

In *Eaton* v. *B. C. & M. R. R.* (1872), 51 N. H. 504, 511:

"The term 'property,' although in common parlance frequently applied to a tract of land or a chattel, in its legal signification 'means only the rights of the owner in relation to it.' 'It denotes a right * * * over a determinate thing.' 'Property is the right of any person to possess, use, enjoy, and dispose of a thing.' Selden, J., in *Wynehamer* v. *The People*, 13 N. Y. 378, p. 433; 1 Blackstone Com. 138; 2 Austin on Jurisprudence, 3d ed., 817, 818. If property in land consists in certain essential rights, and a physical interference with the land substantially subverts one of those rights, such interference 'takes,' *pro tanto*, the owner's 'property.' The right of indefinite user (or of using indefinitely) is an essential quality or attribute of absolute property, without which absolute property can have no legal existence. 'Use is the real side of property.' This right of user necessarily includes

> the right and power of excluding others from using the land. See 2 Austin on Jurisprudence, 3d ed., 836; Wells, J., in *Walker* v. *O. C. W. R. R.*, 103 Mass. 10, p. 14. From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property.'"

A *fortiori*, any interference with a man's right to give is a taking of his property and a tax on giving is a taking of private property for public use without just compensation and without due process of law.

It was certainly beyond the constitutional power of Congress to enact a law which would interfere with any of these attributes of property involved in the cases cited. Consequently, a statute forbidding the owner of property to make a gift of it would be a nullity. So, likewise, would be an Act which would hamper the right of disposition by imposing conditions which would impair the right of disposition, as, for example, a law which would prohibit the owner of property from giving away more than one-half or one-quarter of his property while he is in a normal state of mind and is not subject to undue influence. In like manner, it is contended that an Act which would exact, as a condition or as a penalty for making such gift, the payment of a tax, would likewise deprive the owner of property of one of its essential attributes without due process of law.

In *Buchanan* v. *Warley*, 245 U. S. 60, 74, Mr. Justice Day said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and dis-

posal of a person's acquisitions without control or diminution save by the law of the land. 1 Blackstone's Com. (Cooley's Ed.), 127 (138)."

See also:

Dixon v. *People*, 168 Ill. 179, 180; 39 L. R. A. 116.

Grand Rapids Booming Co. v. *Jarvis*, 30 Mich. 308, 321.

Chicago etc. R. Co. v. *Englewood Connecting R. Co.*, 115 Ill. 375, 385.

Smith v. *Campbell*, 10 N. C. 595, 597.

Jaynes v. *Omaha St. Ry Co.*, 53 Neb. 631, 653.

Eaton v. *Boston etc. R. Co.*, 51 N. H. 504, 511.

The gifts now under consideration were not in the nature of a testamentary gift, like a gift *causa mortis*, which is only to take effect on the contingency of death and is revocable at any time prior to death (*Williams* v. *Guile*, 117 N. Y. 348; *Gardiner* v. *Parker*, 3 Madd. 102; *Edwards* v. *Jones*, 1 Myl. & Craig 226), but they were executed gifts *inter vivos*, not "amphibious," as a gift *causa mortis* was described by Mr. Justice Story to be (*Eq. Jur.*, Sec. 606), or ambulatory, incomplete, or revocable during the donor's lifetime. Likewise characteristics of a gift *causa mortis*.

The rules which apply to a gift in contemplation of death do not, therefore, obtain in respect to a gift made without such a quasi-testamentary purpose in view.

The rules which appertain to a testamentary disposition of property, or to a right of inheritance, or to a so-called estate tax, have no relation to a gift *inter vivos* not made in contemplation of death. Such a gift does not, therefore, come within the principle of *Knowlton* v. *Moore*, 178 U. S. 41, 49, 77, which related to death duties or succession taxes. The basis of such forms of taxation is now well recognized. It is only by reason of statutory enact-

ments that the property of a dead man can pass under his will or by inheritance. At common law the sovereign power had the absolute right to appropriate for its own purposes the property owned by a decedent at the time of his death. The privilege of acquiring the property of a dead man, either under his will or pursuant to the Statutes of Descents or Distribution, is merely a matter of grace.

Magoun v. *Illinois Sav. & Tr. Co.*, 170 U. S. 283.
Blackstone v. *Miller*, 188 U. S. 200, 205.

The sovereign, therefore, having theoretically the right to take all of the property of the decedent, may impose an estate or succession tax or death duty upon the transfer of such property to heirs, legatees or devisees, to the extent of any amount less than the full value of the property. Moreover, it is equally well recognized that, in case of the death of the owner of property, its title is ordinarily transferable only by means of judicial action, and the transfer of title is thus, in a legal sense, dependent upon governmental sanction.

In the case of a gift *inter vivos* this theory does not apply. The sovereign's permission, consent or authority is not required for such a gift. The right to make it is free and untrammeled. The donor is merely exercising one of his fundamental property rights. In making it he is not exercising a privilege based on any statute or ordinance, or upon governmental permission or sanction of any kind. He is not acting under any license. He is not holding his property pursuant to any grace or favor of the sovereign power. Nor is the donor in making the gift carrying on any business or occupation, under authority of government, upon which a tax can be imposed.

Further viewing such a gift from the standpoint of taxation, it is to be observed that Section 319 is in no manner based upon the theory that this tax is imposed for the

purpose of evading the estate tax imposed by the Revenue Act of 1924, or by any predecessor acts upon that theory.

By subdivisions (c) and (d) of Section 302 of the Act that contingency is fully provided for by the declaration that the value of the gross estate of the decedent shall be determined by including in the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated,

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, *in contemplation of or intended to take effect in possession or enjoyment at or after his death*, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, *made by the decedent within two years prior to his death with such a consideration*, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of Part I of this title;
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

If the gift was, therefore, made in contemplation of death, the subject matter, under the conditions specified, would be treated as a part of the estate of the decedent, and, thus, taxable. The tax upon a gift *inter vivos*

and not in contemplation of death, however, does not and, as we contend, may not come within the scope of the provisions just quoted.

In *Schlesinger* v. *Wisconsin*, 270 U. S. 230, which arose under the Inheritance Tax Law of Wisconsin, the Court had occasion to consider a provision declaring that every transfer by or grant, bargain, sale or gift made within six years prior to the death of a grantor, vendor or donor of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, was to be construed to have been made in contemplation of death within the meaning of the statute. The State courts had enforced this statute in the face of the due process clause of the Fourteenth Amendment. The language quoted from the opinion of the Supreme Court of Wisconsin by Mr. Justice McReynolds is significant:

> "'The tax in question is not a property tax but a tax upon the right to receive property from a decedent. It is an excise law. * * * Such [legislative] intent was to tax only gifts made in contemplation of death. That is the only class created. The legislature says that all gifts made within six years of the donor's death shall be construed to be made in contemplation of death,' [which means] 'that they shall conclusively be held to be gifts made in contemplation of death and shall fall within the one taxable class of gifts created by the legislature. * * * In our case the legislative intent we think is clear that the specified gifts were to be conclusively construed to be gifts in contemplation of death. * * * We agree with the applicants that the classification made will not support a tax as one on gifts *inter vivos* only. Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event. It is because only

> one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid. Gifts made in contemplation of death stand in a class by themselves, and as such they are made a part of the inheritance tax law to the end that it may be effectively administered.'"

The tax imposed by Section 319 on such a gift is not payable by the donee, but by the donor and is, therefore, clearly not a succession, estate or inheritance tax or a death duty, but a tax upon the exercise of the constitutional right of the donor to give away his property. It may have constituted a part or the whole of all of his belongings. To illustrate, he may have owned property valued at exactly $100,000. He may have given it to a religious or charitable institution, or to an individual. He may not have had a penny left. He was within his constitutional right in making the gift. Could he be penalized civilly or criminally because when the tax collector should come around he would have no property with which to meet the tax imposed by this statute?

Let us further assume that in the case now before the Court the amount of the tax claimed would approximate 7 per cent. of the gift. If 7 per cent. may be thus exacted, by the same token the payment of 70 per cent. might be required. What, then, would become of the right of disposition? Who would set the limit on the amounts that may be taken?

In seeking to ascertain the basis for the right of taxation upon a gift *inter vivos* not made in contemplation of death, we come to the question as to whether this tax is authorized by the Sixteenth Amendment. That, however, merely empowers Congress "to lay and collect taxes on incomes * * * without apportionment among the several States and without regard to any census or enumeration."

But a gift is not regarded as income under any provision of the Revenue Act. On the contrary, it is expressly excluded from the definition of that term; and so far as concerns the donor, upon whom this tax is sought to be laid, it cannot by the wildest flight of fancy be regarded as income. It does not increase, but diminishes, his property.

Nor is this tax similar to a stamp tax imposed upon the transfer of shares in a corporation. The latter is a creature of government. The transfer of its shares is necessarily made with the sanction of government. Hence the imposition of a stamp duty is based upon the idea that a privilege is conferred upon the transferor.

> *People ex rel. Hatch* v. *Reardon*, 184 N. Y. 431; aff'd 204 U. S. 152.
> *Thomas* v. *United States*, 192 U. S. 363.

Certainly Congress had no power to impose this tax upon property, because that would be a direct tax within the decision in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601.

Nor can it be sustained as a tax within the rule laid down in *Nicol* v. *Ames*, 173 U. S. 509, which related to a tax imposed upon the sale of property pursuant to transactions at an exchange or board of trade. There Mr. Justice Peckham, differentiating such a transaction from sales made generally, said (p. 521):

> "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. . . .Al

> though not created by government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed."

It is needless to argue that such a tax as this cannot be justified by the exercise of the police power, because there is no Federal police power except to the extent conferred by the Eighteenth Amendment. The inquiry is justified as to whether or not a law which taxes the donor of food, clothing or other necessaries of life upon the amount expended for such purposes would be a valid act. If so, gifts to charity, to one's wife and children, to an educational or other philanthropic enterprise, to the community in which one lives, might likewise be made taxable. If valid, the imposition of a tax upon the donor would discourage gifts of such a character and would entail serious detriment to the public welfare. Generosity and kindliness and humane impulses would be penalized. The miser and the egoist alone would be immune.

So far as we have been able to discover there is no precedent for such a tax as that now under consideration. Despite the frequent opportunities that have arisen to strain the ingenuity of legislators to devise new forms of taxation, it has been left to this recent period in history and at a time when the clashing of warfare has ceased to impose an exaction upon the maker of a gift *inter vivos*, even though the income upon the subject of the gift is taxable while in the hands of the donee; and, if a direct tax is properly apportioned, the capital of such gift may also be taxed as against the donee. It would certainly stretch the Federal taxing power far beyond the contemplation of the framers of the Constitution to add this

burden to the ownership of property and thus to curtail the enjoyment of one of the most important attributes of ownership.

II.

The tax imposed by the Revenue Act of 1924 on gifts *inter vivos* is a direct tax and void because not apportioned as required by Article I, §2, clause 3 of the Constitution.

What has been said under Point I as to the character of this tax applies to the proposition now under consideration, and will not be repeated. It is believed that this tax, concededly "novel in this country" and without "historical background," is not an excise tax, as held by the Circuit Court of Appeals for the Second Circuit in *Anderson* v. *McVeir*, 16 Fed. (2nd) 970, but a direct tax on property, as ruled in that case by Judge Augustus N. Hand in the District Court, 10 Fed. (2nd) 813. The reasoning of the latter opinion, based on *Pollock* v. *Farmers' Loan & Trust Co.* (*supra*), *Nicol* v. *Ames* (*supra*), and *Dawson* v. *Kentucky Distilleries*, 255 U. S. 288, is regarded as more potent than that of the Circuit Court of Appeals.

It is assumed in *Blodgett* v. *Holden*, 11 Fed. (2nd) 190, that by Section 324 of the Revenue Act of 1924, which makes operative upon the tax created by Section 319 the provisions of law so far as applicable which pertain to the tax imposed by Section 301 (the estate tax), the unpaid tax becomes a lien upon the property (whether of the donor or donee is uncertain). If that were so, then the contention that the tax is a direct tax on property is strengthened.

III.

A gift made during the calendar year 1924 and prior to June 2, 1924, the date when the Revenue Act of 1924 became a law, was not made taxable by that Act; but if intended that it should be, the Act, in so far as it related to a gift so made, was void because in violation of the Fifth Amendment to the Constitution of the United States.

By Section 319 it is provided that "for the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly."

There is nothing in this language which expressly declares that a gift made prior to June 2, 1924, is intended to be taxed. It is not provided that the tax is imposed on *all* gifts made during the calendar year. The language adopted is fully satisfied when applied to gifts made during the calendar year subsequent to the date of the passage of the Act. If the purpose of the legislators had been otherwise, they would have referred to the gift as one made either before or after the passage of the Act. The failure to do so gives rise to the presumption that the legislation was intended to be prospective, and not retrospective, in its operation. This is especially true of a law imposing taxation, in regard to which it has been frequently declared that such an Act is not to be extended by implication, and that any doubt as to its operation is to be resolved in favor of the taxpayer.

In *Shwab* v. *Doyle*, 258 U. S. 529, the Court was called upon to determine as to the retroactivity of the Revenue

Act of 1916, which imposed a tax upon the transfer of the net estate of every decedent dying after its passage, "to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has consummated a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death." It was held that the Act was not intended to apply to transactions consummated before its passage, and this ruling was made notwithstanding the fact that the statute further declared that "any transfer of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent *within two years prior to his death* with such a consideration [referring to a fair consideration in money or money's worth], shall, unless shown to the contrary, be deemed to have been made in contemplation of death." It was further held that the re-enactment of this provision, with the added provision that the transfer or trust should be taxed whether made before or after the passage of the Act, was not a construction of the earlier Act as being retroactive, but was the expression of a new purpose.

In the opinion delivered by Mr. Justice McKenna we read (pp. 534-535):

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent, 455; Eidman v. Martinez, 184 U. S. 545; Gould v. Gould, 245 U. S. 151; Story, Const., § 1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.' There is absolute prohibition against them when their purpose is punitive; they being then denominated *ex post facto* laws. It is the sense of the situation that that which impels prohibition

> in such case exacts clearness of declaration when burdens are imposed upon completed and remote transactions, or consequences given to them of which there could have been no foresight or contemplation when they were designed and consummated. The Act of September 8, 1916, is within the condemnation. There is certainly in it no declaration of retroactivity, 'clear, strong and imperative,' which is the condition expressed in United States v. Heth, 3 Cranch, 398, 413; also United States v. Burr, 159 U. S. 78, 82 83. If the absence of such determining declaration gives to the statute a double sense, it is the command of the cases that that which rejects retroactive operation must be selected."

See also:

> *Union Trust Co.* v. *Wardell*, 258 U. S. 537.
> *Levy* v. *Wardell*, 258 U. S. 542.
> *Knox* v. *McElligott*, 258 U. S. 546.

Similar in principle are *United States* v. *Field*, 255 U. S. 257, and *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602.

Were this Act, however, to be interpreted as retrospective in its operation, it would be of so arbitrary a character as to offend against the Fifth Amendment to the Constitution of the United States.

This is believed to be the effect of the ruling in *Nichols* v. *Coolidge*, 47 Sup. Ct. Rep. 710, decided May 31, 1927. There it was held that Section 402c of the Revenue Act of 1918, if construed as requiring a tax on the value of property transferred by decedent prior to its passage in entire good faith and without contemplation of death, merely because the conveyance was intended to take effect in possession at or after death, was so arbitrary as to amount to

confiscation, and thus contrary to the protection afforded by the Fifth Amendment. Mr. Justice McReynolds said:

> "Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall."

Lewellyn v. Frick, 268 U. S. 238, arose under the Revenue Act of February 24, 1919, which purported to include policies insuring the life of a decedent in the gross value of his estate as a basis for fixing the transfer tax thereon, though the policies be payable to beneficiaries other than the estate, and which allowed the executor to recover from such beneficiaries their proportions of such tax and make them personally responsible therefor if not paid when due. This provision was construed as inapplicable to transactions antedating the passage of the Act. While the Court refrained from discussing the limits of the power of Congress in such case, Mr. Justice Holmes said:

> "Acts of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. Panama R. R. Co. v. Johnson, 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to transactions taking place after it was passed, but the general principle that the laws are not to be considered as applying to cases which arose before their passage is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways."

It was also held that a declaration in a subsequent Act dealing with the same subject, that a provision contained in it shall be retroactive, helps the conclusion that the

same provision in an earlier Act lacking such declaration was not retroactive.

It may be added that according to this persuasive process of reasoning the same result would follow from the fact that, prior to the passage of the Act now under consideration, Congress had in the Revenue Act expressly declared a purpose to make other cognate provisions applicable to transactions completed before such enactment. This is especially important when one considers that in the Act now under review, Congress, with presumptive knowledge of these statutory precedents, and of the decisions above cited, had deliberately refrained from making a similar declaration of intention.

In the cases now before the Court, the gifts sought to be taxed had been executed prior to the passage of the Revenue Act of 1924. They were not gifts *causa mortis*, but *inter vivos*. There is no pretense that they in any way were made in contemplation of death or for the purpose of evading the provisions of law taxing inheritances. The gifts were in every way lawful and made in the exercise of a constitutional right. The fact that they were consummated but a short time prior to the passage of the law does not affect the constitutional question, there being no claim of bad faith. The situation is, therefore, the same as it would have been had the gifts been made one, five, or ten years prior to this enactment. The fact that the rate of the tax is comparatively small as affecting most donors does not subject it to any different rule than would obtain if it were attempted by a law passed in 1927 to tax at the rate of 50 per cent every gift *inter vivos* made in ordinary course since the beginning of the century.

Respectfully submitted,

LOUIS MARSHALL,
of Counsel for Fannie E. Untermyer and Edward D. Untermyer, Executors, Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 154.—October Term, 1927.

John W. Blodgett, *vs.* Charles Holden, Collector of Internal Revenue.	On Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

[November 21, 1927.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Circuit Court of Appeals for the Sixth Circuit has certified three questions and asked instructions in respect of them. Title 28, Section 346, U. S. C. It is only necessary to answer the one which follows.

> Are the provisions of Sec. 319-324 of the Revenue Act of 1924, c. 234, 43 Stat. 313, unconstitutional insofar as they impose and levy a tax upon transfers of property by gifts *inter vivos*, not made in contemplation of death, and made prior to June 2, 1924, on which date the Act was approved, because the same is a direct tax and unapportioned, or because it takes property without due process, or for public use without just compensation, in violation of the Fifth Amendment?

The Revenue Act approved June 2, 1924, provides—

> Sec. 319. For the calendar year 1924 and each calendar year thereafter, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: 1 per centum of the amount of the taxable gifts not in excess of $50,000; etc. . . .
>
> Sec. 320. If the gift is made in property, the fair market value thereof at the date of the gift shall be considered the amount of the gift. Where property is sold or exchanged for

less than a fair consideration in money or money's worth, then the amount by which the fair market value of the property exceeded the consideration received shall, for the purpose of the tax imposed by section 319, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Section 321 allows certain deductions—

[$50,000; donations for charitable purposes, etc.]

Section 322 is unimportant here.

Section 323. Any person who within the year 1924 or any calendar year thereafter makes any gift or gifts in excess of the deductions allowed by section 321 shall, on or before the 15th day of March, file with the collector a return under oath in duplicate, listing and setting forth therein all gifts and contributions made by him during such calendar year. . . .

Sec. 324. The tax imposed by section 319 shall be paid by the donor on or before the 15th day of March, and shall be assessed, collected, and paid in the same manner and subject, in so far as applicable, to the same provisions of law as the tax imposed by section 301.

Act of February 26, 1926, 44 Stat. 86, c. 27—

Sec. 324. (a) Section 319 of the Revenue Act of 1924 is amended to read as follows:

"Sec. 319. For the calendar year 1924 and the calendar year 1925, a tax equal to the sum of the following is hereby imposed upon the transfer by a resident by gift during such calendar year of any property wherever situated, whether made directly or indirectly, and upon the transfer by a nonresident by gift during such calendar year of any property situated within the United States, whether made directly or indirectly: 1 per centum of the amount of the gifts not in excess of $50,000. . . ." [Some of the succeeding percentages are less and some are higher than those specified by the Act of 1924.]

(b) Subdivision (a) of this section shall take effect as of June 2, 1924.

During the calendar year 1924, and prior to June 2, plaintiff Blodgett, a resident of the United States, transferred by gifts *inter vivos*, and not in contemplation of death, property valued at more

$850,000.00; after June 2 he made other gifts valued at
0.00. The collector exacted of him the tax prescribed by
ct of 1924, as amended, on such transfers and this suit seeks
ry of the sum so paid. The claim is that the Taxing Act,
licable in the circumstances stated, conflicts with the Fifth
dment.

the argument here counsel for Blodgett affirmed that all the
fers prior to June 2 were really made during the month of
ry; and the accuracy of this statement was not questioned.
the circumstances, we will treat this affirmation as if it were
f the recital of facts by the court below.

brief in behalf of the Collector sets out the legislative his-
f the gift tax provisions in the Revenue Act of 1924 and
that they were not presented for the consideration of Con-
prior to February 25 of that year. We must, therefore, de-
e whether Congress had power to impose a charge upon the
because of gifts fully consummated before such provisions
before it.

Nichols v. *Coolidge* (May 31, 1926) this Court pointed out
statute purporting to lay a tax may be so arbitrary and
ious that its enforcement would amount to deprivation of
rty without due process of law within the inhibition of the
Amendment. As to the gifts which Blodgett made during
ry, 1924, we think the challenged enactment is arbitrary and
at reason invalid. It seems wholly unreasonable that one
n entire good faith and without the slightest premonition
h consequence, made absolute disposition of his property
ts should thereafter be required to pay a charge for so doing.
ermination of the cause does not require us to consider other
ions to the Statute which have been advanced. And it is
essary to express an opinion concerning the validity of the
e as to transfers subsequent to June 2. Here, all such gifts
within the exemption granted.

far as the Revenue Act of 1924 undertakes to impose a tax
e of the gifts made during January, 1924, it is arbitrary and
l under the due process clause of the Fifth Amendment.
he question is so answered.

rue copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 154.—October Term, 1927.

John W. Blodgett, *vs.* Charles Holden, Collector of Internal Revenue. } On Certificate from the United States Circuit Court of Appeals for the Sixth Circuit.

[November 21, 1927.]

Mr. Justice Holmes.

Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407, 408. *United States* v. *Standard Brewery*, 251 U. S. 210, 220. *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217. *Bratton* v *Chandler*, 260 U. S. 110, 114. *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390. Words have been strained more than they need to be strained here in order to avoid that doubt. *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401, 402. In a different sphere but embodying the same general attitude as to construction, see *United States* v. *Goelet*, 232 U. S. 293, 297.

By § 319 of the Revenue Act of 1924, (June 2, 1924, c. 234; 43 Stat. 253, 313) a tax is laid on gifts 'For the calendar year 1924 and each calendar year thereafter'. In the Code the words are 'during any calendar year', Title 26, § 1131. The latter phrase brings out what I should think was obvious without its aid, that the purpose is a general one to indicate the periods to be regarded,

as distinguished from fiscal years, not necessarily to run counter to the usual understanding that statutes direct themselves to future not to past transactions. *Reynolds* v. *McArthur*, 2 Pet. 417, 434. *Shaub* v. *Doyle*, 258 U. S. 529, 534. *Lewellyn* v. *Frick*, 268 U. S. 238, 251, 252. If when the statute was passed it had been well recognized that Congress had no power to tax past gifts I think that we should have no trouble in reading the Act as meant to operate only from its date and only to tax gifts thereafter made. If I am right, we should read it in that way now. By § 324 (a) of the Revenue Act of 1926, (February 26, 1926, c. 27; 44 Stat. 9, 86,) § 319 of the Act of 1924 is amended and the rates of taxation are reduced, and then by (b) it is provided that 'subdivision (a) of this section shall take effect as of June 2, 1924', the date when the earlier act was passed. A reasonable interpretation is that the reduction and the tax operate alike on gifts after that date. Taking both statutes into account, and the principles of construction to which I have referred, I think it tolerably plain that the Act should be read as referring only to transactions taking place after it was passed, when to disregard the rule 'would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways.' *Lewellyn* v. *Frick*, 268 U. S. 232, 251, 252.

On the general question whether there is power to tax gifts I express no opinion now. I agree with the result that the plaintiff is entitled to recover the taxes paid in respect of gifts made before the statute went into effect.

Mr. Justice Brandeis, Mr. Justice Sanford and Mr. Justice Stone concur in this opinion.